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36658

MORRIS PAPER MILLS, a corporation,

Appellee,

v.

WALTER A. GATZERT and MODIE J.  
SPIEGEL,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 595<sup>1</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Appeals are here being prosecuted from two judgments of the Municipal Court of Chicago. Orders were entered by the court below, denying motions to strike statements of claim filed in two proceedings in that court by Morris Paper Mills, a corporation, against Walter A. Gatzert and Modie J. Spiegel in the one case, and against Walter A. Gatzert alone in the other. The causes are numbered 36658 and 36659, respectively, in this court. After the motions to strike the statements of claim had been denied, the court below heard evidence on the question of damages and entered judgment for plaintiff in each case. Records and abstracts in each case were filed here. Subsequently, an order was entered here consolidating the two cases for this hearing. Thereafter, single briefs were filed by each of the parties in the consolidated case. The questions as to the sufficiency of the statements of claim are substantially the same in each case. Both cases will be here discussed, and both appeals governed by this opinion.

In case No. 36658 against Gatzert and Spiegel, it is alleged in substance that the action is to recover damages arising out of the failure and refusal of defendants to purchase from the plaintiff upon demand certain municipal bonds; that on January 27th, 1928, plaintiff purchased from the Gatzert Company, an Illinois corporation, engaged in the business of selling stocks and bonds, certain municipal bonds and other municipal securities, which included

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among others, \$35,000 in principal amount of the Village of Dolton, Cook County, Illinois, 6% Special Assessment No. 28, Sanitary & Storm Sewer Bonds; that at the time the bonds were purchased, the defendant Gatzert was, and has since been, the president of the Gatzert Company, and a director and stockholder therein, and that Modie J. Spiegel was, and has since been, a stockholder in the Gatzert Company, and has large financial interests therein; that simultaneously with the purchase of such bonds and other municipal securities from the Gatzert Company, the defendants, Gatzert and Spiegel, in order to induce the plaintiff to purchase the bonds and securities, and in consideration of the purchase of such bonds and securities from the Gatzert Company by the plaintiff, executed and delivered to the plaintiff a written agreement to repurchase such bonds and securities. The alleged agreement as set forth in the statement of claim is as follows:

"Chicago, Illinois  
January 27, 1928.

Morris Paper Mills,  
% Mr. N. F. Leopold, Pres.,  
111 West Washington Street,  
Chicago, Illinois

Dear Mr. Leopold:

We understand that you are purchasing today from Gatzert Company, of Chicago, an Illinois Corporation, the following securities, at the prices mentioned herein:

- \$15,000 Gatzert Co. Series 'L', 6½%, Municipal Securities Trust Certificates, due February 1, 1930, @ 100.90 plus accrued interest;
- \$12,000 Gatzert Co. Series 'L', 6½%, Municipal Securities Trust Certificates, due February 1, 1931, @ 101.35 plus accrued interest;
- \$ 8,000 Gatzert Co. Series 'F' 6% Trust Certificates due January 15, 1931, @ 100.00 plus accrued interest;
- \$13,000 Bristow, Oklahoma, 6%, Paving Bonds, due 'On or before October 1, 1937' (Bonds Nos. 12/37) @ 100.00 plus accrued interest;



\$35,000 Dolton, Cook County, Illinois, 6%, Spec. Assess. No. 28, Sanitary & Storm Sewer Bonds, due Dec. 31, 1932, @ 100.00 plus accrued interest;

\$22,000 Gatzert Co. Series 'R', 5½%, Municipal Securities Trust Certificates, due March 1, 1930, @ 99 plus accrued interest;

\$20,000 Gatzert Co. Series 'R', 5½%, Municipal Securities Trust Certificates, due March 1, 1931, @ 98.64 plus accrued interest.

In this connection, we appreciate the fact that you may at some future date choose to sell all or any part of the above mentioned bonds, only for the purpose of retiring at maturity, or of calling for redemption, all or any part of the Morris Paper Mills First, Gold 6's, which are due serially April 1, 1928, to 1936 inclusive.

If at any time, Gatzert Company will not purchase from you any of the above bonds at prices satisfactory to you, then we, as individuals, do hereby agree that, upon sixty days' notice given in writing, we will purchase from you any or all of the above bonds, upon the following basis:

1. Series 'L' 6½%, Municipal Securities Trust Certificates, due February 1, 1930 and February 1, 1931, at the original price, less one half of one per cent for each six months, or fraction thereof that has elapsed since January 27, 1928,
2. On all other securities purchased herewith at the original price, less one half of one per cent.
3. In any or all cases, the re-purchase price is to include accrued interest.

Yours very truly,

(Sgd.) Walter A. Gatzert  
Modie J. Spiegel"

It is alleged that shortly before January 25th, 1932, plaintiff, for the purpose of obtaining funds to retire at maturity or call for redemption a part of the Morris Paper Mills First Gold 6's then outstanding, requested the Gatzert Company to repurchase from plaintiff certain Municipal bonds, which included among others the \$35,000 of the Village of Dolton bonds hereinbefore described; that the plaintiff offered to sell such bonds to the Gatzert Company at 99½, plus accrued interest, that being the price at which Gatzert and Spiegel had agreed to repurchase such bonds from plaintiff; that such request for the repurchase of such bonds by the Gatzert Company was





made to Walter A. Gatzert, defendant and president of that company; that such request was made in writing, and that the Gatzert Company refused to repurchase any of said bonds, except two in the amount of \$500 each, which they did purchase at 99½, plus accrued interest. It is further alleged that thereafter on June 22nd, 1932, a further demand in writing was made upon defendants to repurchase the said securities, but that the defendants have failed and refused to make such purchase to the damage of the plaintiff in the sum of \$34,000, plus interest, making a total of \$40,000.

In case No. 36659 the allegation is similar to that in the former case as to the sale of bonds by the Gatzert Company to plaintiff, and is to the effect that plaintiff claims damages arising out of the failure and refusal of defendant Gatzert to repurchase from plaintiff upon demand and to take and pay for certain municipal bonds of the Village of Dolton, 6% Special Assessment, Sanitary & Storm Sewer Bonds, in the amount of \$15,000, and Village of Dolton 6% Special Assessment, Sanitary & Storm Sewer Bonds, in the amount of \$10,000, in accordance with certain agreements entered into between plaintiff and said Gatzert; that on or about January 27th, 1928, plaintiff purchased from the Gatzert Company \$15,000 in principal amount of the Village of Dolton bonds before mentioned, and that plaintiff thereafter on or about August 1st, 1928, purchased from the Gatzert Company \$10,000 of the Village of Dolton bonds; that at the time plaintiff purchased these bonds from the Gatzert Company, the defendant Gatzert was, and has since been, president of the Gatzert Company; that simultaneously with the purchase of the \$15,000 Village of Dolton bonds, and in order to induce plaintiff to purchase the bonds, and as a part of the consideration therefor, Gatzert entered into the following agreement with plaintiff, to-wit:

"Chicago, Illinois  
January 27, 1928

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Mr. N. F. Leopold,  
111 W. Washington Street,  
Chicago, Illinois

Dear Mr. Leopold:

In connection with the additional purchase of \$15,000 Village of Dolton, Cook County, Illinois, 6% District No. 28, Sanitary & Storm Sewer Bonds, due December 31, 1933, by the Morris Paper Mills, for delivery tomorrow, it is understood that the same agreement applies as on the original purchase of \$125,000 bonds today. The price is to be the same as on the other Dolton bonds.

Yours very truly,

(Sgd.) Walter A. Gatzert"

It is alleged that simultaneously with the purchase of the \$10,000 Village of Dolton bonds, as above set forth, to induce plaintiff to make such purchase, and as a part of the consideration therefor, Gatzert entered into the following agreement with plaintiff:

"August 1, 1928.

Mr. N. F. Leopold,  
Morris Paper Mills,  
111 West Washington Street,  
Chicago, Illinois

Dear Mr. Leopold:

In connection with your purchase today of \$10,000 Dolton, Cook County, Illinois, 6% special Assessment Bonds (Court Docket No. 57876, due December 31st, 1931, at par, plus accrued interest, it is understood that the same confidential agreement applies to these securities as to one that is outlined in a letter written to you under date of January 27th by Mr. M. J. Spiegel and myself.

Very truly yours,

(Sgd.) Walter A. Gatzert"

It is further alleged by plaintiff that by the words in the letter of January 27th, 1928, concerning the \$15,000 purchase, "for delivery tomorrow, it is understood that the same agreement applies as on the original purchase of \$125,000 bonds today," applies to the letter of January 27th, 1928, to N. F. Leopold concerning plaintiff's purchase of \$125,000 of bonds, signed by Walter A.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

4. *Journal of the American Medical Association*, 1990; 263: 1031-1034.

**6. Summary**

*(continued)*

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PLATE 20. *Continued*

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Gatzert and Modie J. Spiegel and hereinbefore set forth, in so far as terms are concerned, and that the words in the letter of August 1st, 1938, that "it is understood that the same confidential agreement applies to these securities as the one that is outlined in the letter written to you under date of January 27th, signed by Mr. M. J. Spiegel and myself," applies to the same letter already quoted dated January 27th, 1938, and signed by Walter A. Gatzert and M. J. Spiegel. In this latter statement of claim, it is charged that the plaintiff, for the same purposes hereinbefore stated, that is, to obtain funds to retire at maturity or call for redemption part of the Morris Paper Mills First Gold 6's then outstanding, verbally requested Gatzert to repurchase from plaintiff the bonds involved, and requested the Gatzert Company to repurchase the other bonds hereinbefore referred to at a price of 99½, being the price that Gatzert and Spiegel agreed and contracted to pay for the repurchase of such bonds, and that a request was made to Walter A. Gatzert that he repurchase the bonds according to the terms of the alleged agreements, and that demand in writing was made upon Gatzert, the Gatzert Company and Spiegel, that such bonds be repurchased as agreed, but that each and all of them declined to make such repurchase.

The motions to dismiss plaintiff's statements of claim are similar, and allege in substance that the facts stated in these statements of claim are not sufficient in law to give plaintiff the right to recover; that the alleged agreement upon which plaintiff's right of action is based, imposes no legal obligation upon defendant or either of them to purchase the securities mentioned, but that such agreement is and constitutes a mere independent voluntary offer on the part of these defendants to purchase such securities on the terms stated herein, and is not supported by a legal consideration; that the allegation in the statements of claim that "in



order to induce the plaintiff to purchase the said bonds and securities, \* \* \* and in consideration of the purchase of said bonds and securities by plaintiff, that defendants made and executed these written agreements," is a mere conclusion of the pleader; that the statements of claim do not show that the notice and demand for such repurchase made upon defendant and the Gatzert Company was "only for the purpose of retiring at maturity or calling for redemption bonds of said plaintiff known as First Gold 6's due serially April 1st, 1928 to 1936 inclusive," or that the proceeds of such resale of bonds was to retire the bonds of plaintiff at maturity; that the notice delivered to the Gatzert Company and the defendants respectively is not in accordance with the terms of the alleged contracts with defendants, and did not impose upon either of them any obligation to purchase the bonds. Defendants position is that the motion to strike in the Municipal Court of Chicago is in the nature of a demurrer, and in their brief, quote Rule 15 of the Municipal Court to the effect that "every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense." Further, that "in order to support the judgments in these cases, a cause of action must be stated, and that necessarily means every ultimate fact constituting an element in the cause of action must affirmatively appear in order to establish plaintiff's legal right and title to the recovery as evidenced by the judgment." They insist that the letter set forth in the statement of claim dated January 27th, 1928, addressed to the Morris Paper Mills and signed by Walter A. Gatzert and Modie J. Spiegel, and the other letters set forth in the statements of claim are unilateral, and, therefore, impose no obligation upon the Morris Paper Mills to sell said securities or bonds to the defendants at any time.

In Kincaid v. Overshiner, 171 Ill. App. 37, a similar situation was presented to that presented here. The court made the





following statement of fact with regard to the contract sued on in that case:

"On September 15, 1905, defendants were promoting and selling stock of the Petersburg Telephone Company; Lee Kincaid purchased, at the solicitation of defendants, forty shares of the stock and paid the treasurer of the corporation \$1,000, that being the par value of the forty shares.

In order to induce Kincaid to buy this stock, the defendants signed the following agreement:

'We, the undersigned, agree to purchase from Lee Kincaid at any time he should desire to sell to them his stock of the Petersburg Telephone Company, subscribed by him this day, at the price at which he pays for same, namely, \$1,000 for forty shares.

Dated, this 15th day of September, 1905.

E. B. Overshiner,  
John S. Hurie,  
Henry S. Colby.'

In the fore part of 1909, Kincaid became indebted to the Illinois National Bank of Springfield, beneficiary, plaintiff, and pledged this stock to it as security for that indebtedness. In May, 1910, Kincaid filed his petition in bankruptcy, and George E. Keys was appointed trustee of his estate.

The evidence is conflicting as to whether Kincaid made a demand upon defendants to comply with their agreement to purchase this stock before it was pledged as security, but we do not consider that question as material.

On September 9, 1910, the following notice was mailed to defendants and duly received by them:

'Springfield, Ill. Sept. 9, 1910.

Messrs. E. B. Overshiner, Jno. S. Hurie and Henry H. Colby:

Gentlemen: - On September 15, 1905, you signed a written agreement, agreeing to purchase from Lee Kincaid, at any time he should so desire, the forty (40) shares of the capital stock of the Petersburg Telephone Company at the price which he paid for the same in reliance upon your agreement, namely, one thousand (\$1,000) dollars.

The undersigned, and each of them, have elected to sell said stock to you and to have you purchase the same at said price. You may obtain the stock by calling upon the undersigned, George E. Keys, Trustee, upon payment of the said purchase price of one thousand (\$1,000) dollars.

The undersigned, and each of them, will execute and deliver to you any and all transfers and assignments that may be necessary and proper to fully vest the title of stock in you.

Kindly let this have your immediate attention, and oblige,

Yours respectfully,

Lee Kincaid,  
George E. Keys, Trustee of  
the Estate of Lee Kincaid,  
Bankrupt.

Illinois National Bank,

By H. M. Merriam, Cashier.

Said bank holds said stock as collateral."

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

Suit was instituted in the Circuit Court of Menard County against Overshiner, Hurie and Colby, and a judgment was entered against them for \$1,037.50 and costs, which judgment was affirmed by the Appellate Court. The Appellate Court made the following observation in its opinion as to the defense urged in that case:

"Defendants contend that the written agreement of September 15, 1905, was without consideration; that it is unilateral; that action thereon is barred by the five year statute of limitations; that the agreement was a personal one to Kincaid, and was not a matter of assignment, and no recovery can be had thereon for the use of any other person; and that before bringing this action it was necessary that the shares of stock be tendered by the plaintiff on demand for payment. Upon all of these contentions, propositions of law were submitted by defendants to the trial court and refused by it.

Upon the contention that the agreement was without consideration. It was unnecessary that any consideration for the undertaking should pass, or be a benefit to, the defendants; they were officers or directors in the corporation and promoting it, and the promise to purchase this stock by defendants was part of the original undertaking by Kincaid and the consideration therefor was received by and passed to the corporation which defendants were then promoting, and this was sufficient consideration for their agreement to purchase of date September 15.

On the contention that the agreement is unilateral and lacks mutuality. If this agreement was the sole transaction between plaintiff and defendants this contention might be well founded, but the original purchase of the stock by Kincaid and the written agreement by defendants were part of one transaction, and even though the written agreement considered alone lacks mutuality, this will not necessarily defeat an action thereon. Where a unilateral contract has been performed by one party and the consideration for its execution has been received by the other party, the party who has performed may insist on the fulfillment of the contract. Plumb v. Campbell, 129 Ill. 101; Seyferth v. G. & S. R. R. Co. 217 Ill. 487."

In Seyferth v. G. & S. R. R. Co., 217 Ill. 483, cited above, a bill was filed in the Circuit Court of Menard County by Seyferth to enjoin the railroad company from going on his land. From the statement of facts made by the Appellate Court of the 4th District, from which an appeal was taken to the Supreme Court, and which statement of facts was adopted by the Supreme Court, it appears that Seyferth, in consideration of \$1.00, had delivered to the railroad company a written contract by which Seyferth gave an option to the railroad company to purchase certain land at a price named,



and the right of the railroad company to enter upon the land. The instrument was signed by Seyferth and his wife, but the consideration of \$1.00 was not paid. After the execution of the instrument, the \$1.00 consideration was subsequently tendered to the complainant Seyferth, who declined to take it. Upon the railroad company attempting to take possession of the land in question, Seyferth filed the bill for injunction named. Upon a hearing, the bill was dismissed, and on appeal to the Appellate Court, the judgment of the Circuit Court was affirmed, and as stated, on appeal to the Supreme Court, the Appellate Court was affirmed. It was insisted by the complainant Seyferth in the court below and in the Appellate and Supreme Court that the instrument executed was unilateral, and that there was no consideration for its execution. In passing upon this question, the Supreme Court said:

"We might further add that it is now universally held that a written agreement to convey land, at the option of the proposed vendee, within a given time and at a certain price, if made upon a sufficient consideration, with full knowledge on the part of the person extending the option that he is bound and the other is not, is such a contract, though lacking mutuality, as will be enforced in equity, where the party holding the option signifies his acceptance within the time limited upon the terms as stated; and as is said in Guyer v. Warren, 175 Ill. 328, 'where the one holding a buyer's option makes his selection to purchase, and tenders the amount agreed to according to the terms of the contract, it is the duty of the seller to accept the price and execute a deed to the purchaser for the property. \*\*\* Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them,' - citing Watts v. Keller, 56 Fed. Rep. 1."

The allegations in the statements of claim are that the several agreements made between plaintiff and the defendants were made simultaneously with and as a part of the consideration for the purchase of these securities from the Gatzert Company, and that the funds to be derived from the sale of these securities were to be used for the purposes stated in the agreements. The defendants by



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their motions to strike, which are in the nature of demurrers, admit the truth of these allegations. We hold that the agreements were not unilateral, and that there was no failure of consideration. The judgment of the Municipal Court in this case, No. 36658, is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

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36659

MORRIS PAPER MILLS, a  
corporation,

Appellee,

v.

WALTER A. GATZERT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 595<sup>2</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF  
THE COURT.

This case is governed by the opinion in case No.  
36658, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

Opinion filed June 27, 1934

36725

JAMES H. McQUEENY, doing business as  
McQUEENY'S INVESTIGATING AGENCY,

Appellant,

v.

CHARLES S. DENEEN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 595<sup>3</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Municipal Court of Chicago against the plaintiff for costs in a suit for moneys alleged to be due plaintiff for services rendered by his investigating agency in a political campaign and an election. The suit was originally begun, was against the defendant, Charles S. Deneen, and Jacob D. Allen and Harry E. Hoff. Subsequent to the filing of the suit in the Municipal Court, an order of dismissal was entered as to Allen and Hoff.

Thereafter, an amended statement of claim was filed wherein plaintiff charges "that defendant, Charles S. Deneen, was engaged and interested in a political campaign being carried on in Cook County, and was a member of an unincorporated political corporation called the Deneen Group, or the National Republican Party, and at said time maintained headquarters in the Morrison Hotel in the City of Chicago, Illinois; that prior to the first day of April, 1928, the defendant as a member of said organization employed the plaintiff to furnish men to guard Senator Charles S. Deneen and John A. Swanson, who was then a candidate of State's Attorney, and to guard the headquarters of said defendant in the Morrison Hotel, Chicago, Illinois, during the campaign preliminary to April 10th, 1928, at which time a primary election was held, and that the defendant agreed to pay to the plaintiff the sum of \$15 per day for the plaintiff's services and the sum

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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## Introduction

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where  $\mathbf{A} = \mathbf{A}(\mathbf{r})$  is the vector potential,  $\mathbf{r}$  is the position vector, and  $\mathbf{r} \cdot \nabla = \mathbf{r} \cdot \nabla / r$  is the derivative along the direction of the magnetic field.

10. *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy and converts it into chemical energy. Chl *a* is found in the chloroplasts of plants and in the thylakoid membranes of algae. It is a central component of the photosynthetic reaction center, where it plays a key role in the light-dependent reactions of photosynthesis. Chl *a* is also involved in the regulation of photosynthesis and in the protection of the photosynthetic apparatus from damage by reactive oxygen species.

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of \$12 per day for the services of each man furnished by the plaintiff to the defendant and the cash expenses incidental to the performance of said services, covering car fare, taxicab bills, telephone calls, newspapers, gasoline, oil and auto storage for Senator Deneen's car, and that the plaintiff, pursuant to said employment, provided and furnished the services of men and performed services himself as follows:

Personal services of plaintiff 12 days @ \$15 per day ..	\$180.00
Services of 2 men assigned to Senator Charles S. Deneen, 11 days @ \$12 per day each . . . . .	264.00
Services of 1 man assigned to Hon. John A. Swanson 4 days @ \$12 per day . . . . .	48.00
1 man assigned to headquarters at the Morrison Hotel, 10 days @ \$12 per day. . . . .	120.00

That the plaintiff paid for carfare, taxicabs, telephone calls, newspapers, gasoline, oil and auto storage for Senator Deneen's car, the sum of	<u>37.60</u>
making a total sum for the services aforesaid of	\$649.60

which the defendant agreed to pay to the plaintiff, and which is past due and unpaid.

Plaintiff further alleges that on April 10th, 1928, the defendant as a member of said organization, employed the plaintiff and the plaintiff agreed to furnish men to check up certain precincts in the primary election of April 10th, 1928, where the ballots were not being properly counted, or were late in being returned to the Board of Election Commissioners, and that at the special instance and request of the defendant, the plaintiff furnished 84 men who checked up on said precincts, and the defendant agreed to pay to the plaintiff for the services of said men \$12 each, or a total sum of \$1,008.00, which is past due and unpaid; that prior to the 10th day of April, 1928, and in the month of April, 1928, the defendant as a member of said organization employed the plaintiff, and the plaintiff agreed to furnish men to guard certain polling places at the primary elections held on April 10th, 1928, in the following wards and



precincts in the City of Chicago and in the City of Cicero, Cook County, Illinois, to wit:

36th Ward of Chicago, 64 men in 30 precincts  
 27th Ward of Chicago, 32 men in 16 precincts  
 24th Ward of Chicago, 62 men in 31 precincts  
 29th Ward of Chicago, 54 men in 27 precincts

and in the City of Cicero, to wit: 88 men in 44 precincts; that the plaintiff, pursuant to said request employed said men, and the defendant agreed to pay to the plaintiff for the services of said men, the sum of \$12 per day each; that the total number of men employed was 300 men for one day each, making a total which the defendant agreed to pay to the plaintiff of \$3,600, which is past due and unpaid; that in the month of April, 1928, defendant as a member of said organization employed the plaintiff and the plaintiff agreed to furnish men to guard the ballots in the County Clerk's office and the Election Commissioner's office and the vaults on the 3 $\frac{1}{2}$  floor of the City Hall after the primary election of April 10, 1928, and from April 10th, 1928, to May 31st, 1928; that the defendant agreed to pay the plaintiff for the services of such men the sum of \$10 per day each; that the plaintiff at the request of the said defendant, and pursuant to said employment, furnished men to guard said ballots and vaults as aforesaid from April 10th, 1928, to May 31st, 1928; that the men so furnished worked in shifts of eight hours each covering the 24 hours of each day; that the plaintiff furnished to the defendant six men to guard the ballots in the County Clerk's office, six men to guard the ballots in the Election Commissioners' office, and six men to guard the vaults on the 3 $\frac{1}{2}$  floor of the City Hall, for a period of 51 days, and in addition thereto, furnished six men on April 10th, 1928, for one shift each to guard the vaults on the 3 $\frac{1}{2}$  floor of the City Hall; that the defendant agreed to pay the plaintiff for the services of said men the

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sum of \$9,340.00, which is past due and unpaid; that prior to the 10th day of April, 1928, the defendant as a member of said organization employed the plaintiff and the plaintiff agreed to furnish men to guard the polling places at the primary election to be held April 10th, 1928, in certain country towns and districts in Cook County, Illinois, as follows:

Northfield Township	12 men in 6 districts
Norwood Park	4 men in 2 districts
Proviso Township	6 men in 3 districts
Riverside	4 men in 2 districts
Schaumburg Township	2 men in 1 district
Stickney	4 men in 2 districts
Thornton Township	10 men in 5 districts
Chicago Heights	34 men in 17 precincts
Summit	8 men in 4 precincts
Bremen Township	6 men in 3 precincts
Calumet	4 men in 2 districts
Elk Grove Township	4 men in 2 districts
Hanover Township	4 men in 2 districts
Leyden Township	2 men in 1 district
Maine Township	4 men in 2 districts
New Trier Township	2 men in 1 district
Lyons Township	14 men in 7 districts

and at the same time also agreed to pay to the plaintiff the sum of \$12 per day for each man so employed; that the plaintiff employed 124 men for said purpose who performed the services in accordance with said agreement between the plaintiff and the defendant, and the defendant agreed to pay the plaintiff for the services of said men the sum of \$1,488.00, and in addition thereto, train fares, bus fares, cab fares and telephones for said men amounting to \$87.41, making a total which the defendant agreed to pay to the plaintiff for the services and expenses of said men of \$1,575.41, which is past due and unpaid; that the total amount which the defendant agreed to pay the plaintiff for the foregoing services was the sum of \$16,073.01; that there was paid to the plaintiff on account of said services the sum of \$4,700.00 in payments as follows:

June 30, 1928	\$1,000.00
Oct. 29, 1928	.1,500.00
Dec. 22, 1928	2,200.00



leaving a balance due on December 22, 1928, from the defendant to the plaintiff of \$11,373.01, which said sum the defendant agreed to pay the plaintiff and which said sum is now past due and unpaid; that the plaintiff has often requested the defendant to pay the said sum, and that the defendant has failed so to do; that there is now due and owing from the defendant to the plaintiff the sum of \$11,373.01, together with interest thereon at the rate of 5% per annum from the 22nd day of December, 1928." In brief, plaintiff states his case as follows: that the defendant was liable to pay plaintiff's claim because he was a member of an unincorporated voluntary association known as the National Republican Party of Cook County, the Deneen group, and that as a member of the group named - if he was such a member - he either employed plaintiff or ratified such employment.

The theory of the defense is that the National Republican Party of Cook County was a voluntary unincorporated association, not for profit; that a member of such voluntary association is liable only for such obligations of the association as such member himself contracted, or which he expressly or impliedly authorized or ratified; that mere membership in the association did not render a defendant liable for the debts of the group; that in this case, defendant Deneen did not himself employ the plaintiff, as alleged in the statement of claim to render any of the services for which plaintiff sues; that defendant did not expressly or impliedly authorize anyone else to employ the plaintiff, nor did he ratify the employment of plaintiff; that the defendant had no knowledge or information as to whether or not the plaintiff rendered any of the services for which defendant sued, and that the defendant did not render any of the alleged services, and that if such services were rendered, as alleged, there was no legal proof offered upon which a finding for plaintiff could have been made and that the proof tendered by plain-



tiff as to the merit of his claim was rejected by the trial court.

James H. McQueeney, plaintiff, testified in substance that he had certain negotiations with the National Republican Party, or the Deneen group, prior to April 10th, 1928, and that his first negotiations were with a Mr. Allen at the headquarters of the National Republican Party in the Morrison Hotel in Chicago, and that there were present at this meeting Jacob D. Allen and Solomon P. Roderick; that at that meeting Allen said to him, "We will need you, and you will keep yourself available for an immediate call;" that a day or two after the meeting last referred to, McQueeney met Allen again at the Morrison Hotel, and that Allen said, "The first thing I want you to do is to send over here a good man to watch the headquarters to keep the people out of the office that have no business there;" that he, Allen, expected some trouble, and said, "We want a good man. Have him report here to-morrow morning at 8 o'clock;" that he, plaintiff, sent a man to the headquarters referred to, and that this man worked there for 10 days prior to April 10th, 1928; that at the meeting last referred to, the plaintiff told Allen that his charge would be \$10.00 per day per man, together with this man's expenses, and that Allen said, "All right, have him report to me in the morning at 8 o'clock;" that he, plaintiff, talked with Allen about having men go about with Senator Deneen, and that about the first of April plaintiff had a conference with Allen, at which Senator Deneen was present, and at that meeting Allen said, "I want you to get a good man and a chauffeur and yourself to go with the Senator. As you know, his home has been bombed, and there is fear of personal violence. I have talked it over with the Senator and he is here now;" that Senator Deneen was in an adjoining room, and that he, the Senator, took no part in the conversation, but that after his talk with Allen, plaintiff stepped into an adjoining room



and that Senator Deneen said to him, "I want you to come with me McQueeny, and one of your men and a driver;" that the plaintiff furnished a man to drive the car, and that he drove Senator Deneen about for a week or 10 days, and that the plaintiff was with them almost every day; that at a meeting between Senator Deneen, Allen and himself, Allen said, "This will be the usual and customary charge of \$10.00 per day and whatever expenses are necessarily incurred," and that the plaintiff told Allen his services would be worth \$15.00 per day. Plaintiff testified that in another conversation had with Allen, Allen said, "I want one of your men to go with Judge Swanson," and that plaintiff furnished a man who was with Judge Swanson for 4 days, and that plaintiff told Allen that he would charge the usual and customary rate for the services of this man; that plaintiff furnished two men who drove with Senator Deneen to and from political meetings in the city of Chicago and Cook County, that the money for their expenses was paid to the amount of \$37.60, that the total amount of services and expenses in connection with the men assigned to Senator Deneen and Judge Swanson, also the guards at the Morrison Hotel, amounted to \$640.60; that he, Allen, wanted men to guard the different polling places throughout Chicago and the country towns, and that Allen stated that plaintiff would have to take that matter up with Mr. Thomas J. Healy, and that after Allen had a conversation with Mr. Healy, Allen stated to the witness that they needed men to guard the polls at various polling places.

Plaintiff here exhibited a memorandum which he claimed was drawn by Thomas J. Healy and presented to him upon which the following was noted: "Jan. 12, 1933, all 26 Ward, All Cicero, 27 Pre. 29 Ward, all 24 Ward and 27 Ward." The witness further testified that he was told by Allen and Healy to put two men in the precincts noted in this memorandum.





Plaintiff, produced a memorandum which was admitted in evidence, which the witness said, indicated certain precincts in other wards in which plaintiff testified Mr. Healy and Mr. Allen told him to place men on election day. The witness further testified in substance that thereafter approximately 500 men were assembled in the Morrison Hotel, but that neither Mr. Allen, Mr. Deneen nor Mr. Hoff were present at that time; that on the 10th day of April, 1928, he had a conversation with Mr. Allen, Senator Deneen and Harry Hoff at the Morrison Hotel, and that at that meeting Senator Deneen said, "I want you to get busy right away and get all the men you can and get them to the Election Commissioners. In certain precincts they are holding back the returns, and I want to send men out there and bring these returns in;" that Senator Deneen said, "Come with me at once to the Election Commissioners, we are going there now. As soon as those ballots are in, I want you to assign men to guard the ballots in the vaults in the Election Commissioners office until this election is settled, and that the important thing now is to get these precincts in that are holding out;" that the plaintiff Senator Deneen, A. Gzarnecki, Harry Hoff and other persons then proceeded to the Board of Election Commissioners, and that Senator Deneen there said to Judge Jarecki, "I want policemen to bring in these precincts. They are holding out the returns in certain democratic precincts in the southside wards," and that Judge Jarecki stated to Senator Deneen, "We haven't enough policemen there," and that Senator Deneen said, "Get them", and that Senator Deneen said to the witness, "You stay here and get your men over here as fast as you can, and send a man with each one of these policemen. As soon as your men come here, send a man out with each of the police officers, and where the precincts are already counted and they are holding the returns back, demand that these precincts be brought in to the Board of Election Commissioners;" that at



that meeting, Deneen also said to plaintiff, "Hoff will have direct charge of the work, you keep in touch with Hoff and take directions from Hoff," and that by midnight of said day, plaintiff had collected together about 84 men, and had sent them out to the different precincts, with directions that they report back to the plaintiff at the Election Commissioners Office.

Memoranda purporting to show the names of the men employed in the work referred to and their places of assignment, were offered in evidence, to which offer the court sustained an objection upon the theory that there had been no proof that any of these men had performed the services suggested by the witness. The witness stated that after these men had performed the services claimed, they returned to him and rendered an account of their services and the time employed, and that he made entries thereof on certain sheets of paper.

The plaintiff offered in evidence certain sheets purporting to show amounts paid out by him on account of the expenses of these various persons who are alleged to have been employed, to which objection was made and sustained upon the ground that there was no testimony offered to support this alleged account or to support plaintiff's contention that the men actually worked. The witness had previously stated that the original sheets purporting to contain memoranda of the services of various men alleged to have been employed under the claimed contract with the defendant had been destroyed, but that the lists offered were copies of the originals. The witness offered testimony to the effect that he had sent bills to Thomas J. Healy for the alleged services of his men, to which objection was made by the defendant Deneen, and sustained by the court. Plaintiff offered the following letter, alleged to have been written by the defendant, which was received in evidence.



"January 13 M. H.  
UNITED STATES SENATE  
Committee on the Judiciary

April 13, 1928.

Mr. Jas. H. McQueeney,  
Suite 600, 17 N. La Salle St.,  
Chicago, Illinois

My Dear Mr. McQueeney:

I was so busy in Chicago that I did not have an opportunity to answer my mail. I do not think I spoke to you about your letter when I was there. I read it, however, and conferred with others about it. I was pleased with the work you did during the campaign. Some time after Congress adjourns I shall be pleased to see you and talk with you about certain conditions in Chicago.

Yours very truly,

(Signed) C. S. Deneen"

Plaintiff further testified that on April 10th, 1928, Senator Deneen called the witness on the telephone at about 9 o'clock in the morning and that the Senator said, "I have just got in from Washington, and I am going over to that funeral in the 20th Ward, and I want you and your men to come with me, the same men that have guarded me during this campaign. I don't expect any trouble, but this is a stronghold of the Eller faction. I don't have to tell you what the 20th Ward is, but I want you and your men to meet me at the Union League Club at about 1 o'clock P.M." to which the witness testified he answered, "All right, Senator, we will be there." Plaintiff testified that at that time Senator Deneen said, "Have you put in your bill for the work you have done for us?" and that plaintiff answered that he had, and that the Senator then said, "Well, does that include the time with me?" to which the witness answered, "Yes," and that the Senator then said, "That is all right, in case you had not, you could send that bill to me direct." The plaintiff further testified that the work referred to had to do with the services rendered to Senator Deneen personally.

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There was offered and received in evidence on behalf of plaintiff, the following, purporting to be a copy of a letter sent by plaintiff to defendant:

"January 13th M. H.

April 28, 1928.

Honorable Chas. S. Deneen,  
U. S. Senator,  
Washington, D. C.

Dear Senator:

Find enclosed herewith copy of my report to Mr. A. R. Brunner, who is the gentleman that I was talking to you about. I thought you might like to know what was accomplished on election day through Mr. Brunner's aid, so I am enclosing a copy of my report to him.

The evidence we obtained through the men put out by Mr. Brunner and myself was appalling and I think sufficient evidence was obtained in the 20th, 24th, 26th and 27th Wards, which, if worked up, would be all almost sufficient to throw the vote out in these Wards in their entirety.

In addition to the matter that we handled for Mr. Brunner, Mr. Thomas J. Healy had us to handle different bad spots for the organization.

I am particularly proud of the work that we accomplished in Cicero. The organization had no one to take care of Cicero and Mr. Healy turned the whole matter over to me to look after. It was the first election in a good many years that a peaceful election was held in Cicero and the organization got a fair vote there; I think we deserve credit for what we accomplished there.

I thought that the above data would be of interest, so I took the liberty to write you concerning the same.

Thanking you for your kind attention, I remain

Very truly yours,

McQ/Gs

McQueeny Investigating Agency  
By: (Signed) Jas. H. McQueeny"

On behalf of the plaintiff, the following was received in evidence:

UNITED STATES SENATE

Committee on the Judiciary

May 12, 1928.

Mr. James H. McQueeny,  
123 West Madison Street,  
Chicago.

Dear Mr. McQueeny:





Your letter of the 28th ultimo was duly received at the office and was answered by my secretary, Mr. Mason, and put into my personal files for me to attend to at my early convenience. It has just come to my attention and I am writing to thank you cordially for your thoughtfulness and courtesy in giving me the information contained therein.

I take it for granted that you have furnished the information transmitted to the proper persons in Chicago. If you have not, I think you should do so. Judge Daniel P. Trude is home from his vacation and I wish you would confer with him about the matter.

I may add that I was pleased to have an opportunity to become better acquainted with you and your friends and I wish to thank you cordially for your services during the campaign. You did not render me a bill for the services at the Granady funeral. I should be pleased to have you send it to me, unless it has been paid by the campaign committee.

On my return to Chicago after the National Convention, I should be pleased indeed to have an opportunity to discuss some matters with you at length.

Yours very truly,

(Signed) C. S. Deneen"

to which plaintiff replied as follows:

"July 28, 1928.

Hon Charles S. Deneen,  
State Bank of Chicago,  
Chicago.

Dear Senator:

Find enclosed herewith a letter which I wrote to Mr. Thomas J. Healy concerning my bills due for services rendered in connection with the April 10th, 1928 primary.

It is now going on four months since the April Primary and I have not yet been paid for my services. As I explained in my letter to Mr. Healy, the major portion of my bill represented payroll expenditures which I was required to pay out at the time. When I advanced the money for this purpose, I thought, of course, I would be reimbursed within a short time, but I am still waiting for my money.

Of course, if the money is not available at this time to pay out, I am willing to help along as much as possible by waiting until the money is available, but I do think Mr. Healy ought to arrange to pay me at least a part of my bill at this time.

Am sorry to have to bother you in regard to this matter. In fact, the reason I have waited as long as I have before taking the matter up with you, was because I thought the bills would be paid almost any day.

Thanking you for your very kind attention, I am

Very truly yours,  
McQueeny Investigating Agency,  
By Jas. H. McQueeny"



Plaintiff testified that thereafter he received from Senator Deneen defendant, the following letter:

"UNITED STATES SENATE  
Committee on the Judiciary

August 3, 1928.

McQueeney's Investigating Agency  
123 West Madison Street,  
Chicago, Illinois

Gentlemen: Attention: Mr. James H. McQueeney.

I have your letter of the 28th ultimo. I shall call a meeting of our friends early during the coming week and shall submit your letter to them. It will receive prompt consideration.

Very truly yours,

(Signed) C. S. Deneen"

There was also offered and received in evidence the following letter from defendant to plaintiff:

"UNITED STATES SENATE  
Committee on the Judiciary  
120 South La Salle Street,  
Chicago

October 30, 1928.

Mr. James H. McQueeney,  
McQueeney's Investigating Agency,  
123 West Madison Street,  
Chicago, Illinois

My dear Mr. McQueeney:

I have your letter of October 26th. I shall take up with Mr. Healy the matter of the unpaid bills for the last primary. I had expected to do so today but Mr. Healy was not at our meeting. I wish to have all our debts paid before election.

Yours very truly,

(signed) C. S. Deneen"

Plaintiff testified that he had received \$4,700.00 by check from Thomas J. Healy on account of the work alleged to have been done. He also stated that in the month of October, 1928, in the office of Senator Deneen in the State Bank Building in Chicago,

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the defendant Deneen said to the plaintiff, "Mr. Slusser, who is one of the state's attorneys handling the special grand jury investigation of the election frauds and disorders of the April 10, 1928, primary, is in communication with me, and is very anxious to avail himself of the evidence that you secured at the April 10, 1928 primary, and I wish you would turn over to him and work with him on all those cases you have", to which the witness replied, "I will be glad to do so, but there is still a question of my bills here. I would like to know, Senator, when my bills are going to be paid. They have been partly paid, but there is a considerable balance still due," to which the witness testified defendant replied, "I don't think you have to worry about that. We haven't very much money now, and we have a lot of things. You are not the only one we owe money to, but you ride along with us and I will see that you get your money. Now I wish you would go ahead and work with Mr. Slusser and do all you can to help in clearing up these election frauds and see that these election frauds are prosecuted, and every evidence you have submitted to Mr. Loesch and his assistants." Plaintiff replied that he would do as the defendant suggested. Plaintiff further testified in substance that he called on defendant with reference to the balance of his bill; that defendant then said there was held in the West Side National Bank the sum of \$10,000 to take care of the bills and claims against the organization; that defendant asked the plaintiff to take a \$4,500.00 mortgage and wait a year or so and that funds would be raised to take care of the plaintiff's bills, to which proposition plaintiff testified that he agreed, and that defendant said, "You will continue to do our work and I have the highest regard for your work, and I never questioned your work and there is no reason why you cannot keep on doing our work. I think our group will agree to that," and that the witness replied, "That is agreeable to me."



On cross-examination, plaintiff stated that he could not give the exact number of days he went around with Senator Deneen. Jacob D. Allen, who as already stated was originally made defendant in this case, was produced as a witness for plaintiff and asked whether or not he employed McQueeney, to which he replied, "No", and that McQueeney's men did not report to him at the headquarters, and that they received no instructions from him. He testified that he saw some men around the headquarters referred to in the Morrison Hotel in Chicago, and the witness was asked, "Who were you working for?", to which he answered, "The Party, the National Republican Party of Cook County." The witness was asked whether or not he was employed by Senator Deneen, and he said he was not.

Harry E. Hoff, who was also an original party defendant in the instant case, was produced by the plaintiff as a witness. Hoff testified that he O.K'd the bill presented by the plaintiff for services of men after April 10th, 1928; that he received a letter from Thomas J. Healy, who was then the treasurer of the group, and who is now deceased, asking about the men on the ballot watch at the Election Commissioners, that he O.K'd a bill and sent it to Mr. Healy. This witness was asked if the defendant Deneen was a member of the National Republican Party, and he replied that the defendant attended meetings of the National Republican Party, and that Senator Deneen and a great many more men were with the group, but that the witness did not see the defendant around the headquarters, or in the office of the Election Commissioners. He stated that on one occasion the defendant presided at a meeting.

On cross-examination, this witness stated that Thomas J. Healy sent him plaintiff's bill for guards and ballot watchers, which the witness O.K'd and returned to Healy.

One Herbert J. Kayser testified that he was an inspector





and investigator for the plaintiff, and that on the 10th of April, 1938, he was at the headquarters and that he saw Senator Deneen there more than once.

Arthur Werner, an investigator for plaintiff, testified that on April 2nd, 1938, he reported at the National Republican headquarters to Mr. Allen and Senator Deneen and was introduced to them by plaintiff; that on April 10th, 1938, the witness took Senator Deneen to his polling place in Mr. Allen's car; that at one time he accompanied Senator Deneen to the Election Commissioners' Office, and that Senator Deneen there stated that he wanted police officers to go to the polling places, and that Senator Deneen told the plaintiff to send men to the polling places where the ballots were late in coming in; that about 12:30 that night the witness went with Senator Deneen to the Union League Club; that on April 11th, 1938, the witness picked Senator Deneen up at the Union League Club and took him to the B & O Depot at 12:15 on that date. He said he remembered the day of the Granady funeral, that he talked with Senator Deneen and saw him come out of the Union League Club on that day; that the senator got in a car and that the witness followed him to the funeral in a cab.

Rose Granata testified on behalf of plaintiff in substance that she was a stenographer employed by J. L. Mitchell, receiver of the West Side National Bank; that she was also a stenographer for Thomas J. Healy, and that while she worked in that capacity, the National Republican Party had a bank account with the West Side National Bank; that checks on such account were drawn by Thomas J. Healy and the witness, and that Mr. Healy was the only one who instructed the witness to draw any checks on that account. This witness stated that the account of the National Republican Party was drawn out of this bank on a check, that the check was drawn in pursuance



of a voucher delivered to her by C. L. Marlow, secretary to defendant Deneen, and signed by C. L. Marlow and Roy O. West; that the vouchers delivered in payment of National Republican Party bills were all approved by C. L. Marlow and Roy O. West in the year 1931, but previous to that time these vouchers were drawn by Jacob D. Allen and by someone else whose name the witness could not recall. The witness testified that she never had any vouchers containing the defendant Deneen's signature, and that she never talked to Senator Deneen or Mr. West about the plaintiff's account.

Chas. S. Deneen, the defendant, testified in substance that the National Republican Party was never an organization, that it had no officers nor records; that a certain group with whom the witness worked, used the name "National Republican Party", and that they adopted this name rather than the words "Deneen Group". The witness testified that in 1928, at the time of the election of Ward Committeeman, the witness was absent in Washington; that in 1928 he was one of the United States senators from Illinois, and that the Senate was in session in March and April of that year, and that he was in Washington during most of the sessions; that he returned to Chicago on March 29th, 1928, and that he had no conversation with Mr. McQueeny or Mr. Allen in the headquarters on or about April 1st, 1928. Defendant denied that he requested Mr. McQueeny to have a man or men go round with him, and that from his recollection, he was not at the headquarters in the Morrison Hotel prior to the night of April 10th, 1928, when he visited the headquarters about 10:30 or 11 o'clock; that he had no recollection of Mr. McQueeny being at the headquarters, and he denied that he requested Mr. Hoff or Mr. Allen to come over to the headquarters on the evening of April 10th, 1928, and he denied that he requested Mr. McQueeny to send any men to the



Election Commissioners on the night of April 10th, 1928. He further testified that he had no part in raising funds, or spending funds, that he attended no meetings where these funds were raised for such purpose as the primary campaign; that he attended a meeting held for Judge Swanson in July, 1928, but that he was not at the headquarters in the Morrison Hotel, to the best of his recollection, during the campaign. Defendant stated that he made political speeches in the campaign within 10 or 12 days of the primary; that in traveling about, Mr. McQueeney was with him on several occasions, and that two other men were with him at these times; that he assumed Mr. Healy was treasurer of the National Republican Party, but that he had nothing to do with it; that a number of candidates had their headquarters in the Morrison Hotel, and that he had no personal knowledge about any funds that were raised or distributed during the campaign, and that he was not in the city at all the last 12 days of the April campaign, 1928. He stated that on April 10th, 1928, he was over to the Board of Election Commissioners at about 11 o'clock. He was asked if he sent for Mr. McQueeney, and he replied that he did not, and that he knew nothing about McQueeney coming over to the headquarters.

Harry J. Lafrenere, a witness produced by the defendant, testified that he was the chief clerk of the Union League Club, and that he occupied that position in April, 1928. He produced for identification the registration card of the Union League Club of Charles S. Deneen. The witness testified that the card showed that Senator Deneen registered at the club April 16th, 1928, at 9:09 A.M. and that he checked out April 22nd, 1928, at 12:30 P.M., and that the record was kept under the personal supervision of the witness.

Hazel Burkhardt, called on behalf of Mr. Deneen, testified that she was a typist and ran a switchboard at the office of the Illinois Industrial Commission in April, 1928; that in March



and April, 1928, she was employed at the headquarters of the National Republican Party in the Morrison Hotel, and that she handled the switchboard there from 9 o'clock in the morning until evening when the headquarters closed; that the switchboard was located in the reception room of the headquarters, and that the witness was in a position to see anyone who came in and out of the headquarters, and that she did not see Senator Deneen in the headquarters prior to the night of April 10th, 1928, and that to her knowledge, he was never there prior to that night.

John W. Groves testified that he was secretary and treasurer of the Moir Hotel Company, which operated the Morrison Hotel in 1928, and that he was in charge of the records of that hotel. He produced a ledger which showed that the Cameo Room of the Morrison Hotel was rented on April 9th, 1928, to the "Swanson Business Men", and that the words "A. R. Brunner, 15th Floor, Conway Building", appearing in this ledger, meant that they were to send the bills to Brunner. This witness testified that this ledger contained no record of renting of quarters in the Morrison Hotel to the National Republican Party on April 9th, 1928, and that if there had been any such renting, he would have a record of it.

Jacob D. Allen testified for the defendant that he was never in the headquarters of the National Republican Party prior to April 10th, 1928; that he had heard the testimony of the plaintiff as to a conversation alleged to have been held between plaintiff, the witness and defendant Deneen on or about April 1st, 1928, but that he was not present at such conversation. The witness further testified that he was not present at any conversation alleged to have been held between the witness, Mr. McQueeney or plaintiff prior to April 10th, 1928, that there never was any such conversation held between the witness and McQueeney, and that he never employed McQueeney to guard Senator Deneen, that neither the plaintiff nor his

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men used the witness' car to take Senator Deneen around prior to the primary of April 10th, 1928; that someone came to him and said that arrangements had been made to carry Senator Deneen to meetings, and that the witness stated to this person that he could use the car of the witness, but at this time, Mr. Deneen, the defendant, was not present. Allen further testified that Mr. Deneen was not present at the time of an alleged conversation between the witness and the plaintiff on April 2nd, 1928, about 7:30 P.M. at the Morrison Hotel. He also testified that he did not call the plaintiff up and ask him to come over to the headquarters in the Morrison Hotel on the night of April 10th, 1928, that he was not present at any conversation at or about that time when somebody told McQueeny that Mr. Deneen wanted him. The witness stated that on the night of April 10th, 1928, he remained at the headquarters all night, and that he was constantly in charge of the telephones there. The witness further stated he was not present and did not hear Senator Deneen say to the plaintiff on the night of April 10th, 1928, in the headquarters of the party, "I want you to get busy right away and get all the men you can and get them to the Election Commissioners," nor did he hear Senator Deneen say to plaintiff, "In certain precincts they are holding back the returns and I want you to send out men to bring the returns in", nor did he hear Senator Deneen say, "Come with me down to the Election Commissioners, we are going down there. As soon as these ballots are in, I want you to assign men to guard these until the election is settled." The witness further stated that he was never authorized by Mr. Deneen to contract any obligations on behalf of the National Republican Party of any kind, or to incur any obligations on behalf of Senator Deneen personally. The witness testified that Senator Deneen's coming to the headquarters on April 10th, 1928, was in response to a tele-



phone call. He also stated he had no recollection of seeing the plaintiff at the headquarters that night about the plaintiff assigning men to guard the vaults at the Election Commissioners' Office.

To prove that he had furnished a great number of men on behalf of defendant on the day of the primary election on April 10th, 1928, to guard the polls and see that no fraud was committed, and to see that in certain election precincts where he said the returns were being held back, that proper returns should be made, plaintiff testified that after a conversation with defendant Deneen in the office of the Election Commissioners, he got a group of fellows together and started to round up men, and by midnight they had collected together about 84 men and had them sent out to these different precincts. He stated that these men were sent out from the board of election commissioners' office, and that these 84 men reported to him, that he sent them to different precincts, that they would then report back to him at the board of election commissioners' office, that they reported when they came in from the different precincts during the night, that some didn't come in until 2 or 3 o'clock the next morning, that would be the 11th. Plaintiff stated he left the election commissioners' office about 4 o'clock in the morning, that those 84 men he sent out returned between the hours of 10, 11 or 12, started about 10 or 11 o'clock and continued until about 2 or 3 o'clock in the morning, or somewhere around there. With respect to the men that worked on primary day in the 26th, 27th, 24th, 29th wards and in Cicero, plaintiff stated that he started out on primary day, April 10th, about 6 o'clock in the morning and visited the different precincts. With respect to the men who worked in the country towns on primary day, April 10th, 1928, particularly with reference to the towns that are enumerated on the bill marked for identification in plaintiff's exhibit, plaintiff testified that he



was not able to state the names of the persons and precincts to which he assigned them in those towns from recollection independent of the papers. He stated he kept records at the time that these men were assigned to that work, and that he kept a sheet giving the names, the districts and the towns to which the men were assigned, that he made that at the time they were assigned to the work, that he did not have the sheet, as it was destroyed. The sheet was a printed form issued by the board of election commissioners showing the addresses of the polling places, that it was a large sheet that he used the back of to assign all the men in Chicago and in the country towns, and he used the same form to write on the names of the men that would go to the country towns, that after those sheets were made, plaintiff transcribed on two ledger sheets the names and locations and precincts or districts that these men were to go to; that he did that after April 10th, starting the following day after the election, and that he put in a day or two after that completing it. Plaintiff stated that the sheets were here, that the sheets show the names, and precincts and districts where the men worked in those country towns, and that he would produce them, that they covered all the men that worked in the country towns, that is, 87 of the men. Plaintiff further stated that after these sheets were made, he checked them with the first ones that were destroyed and found these to be correct in accordance with his assignments as shown by those original sheets, and that he destroyed the original sheets after he checked them with these.

The amounts which plaintiff insists are due and unpaid from defendant are briefly as follows:

For personal services of the plaintiff for 12 days  
 at \$15.00 per day  
 Services of 2 men assigned by defendant, 11 days  
 at \$12.00 per day  
 Service of 1 man assigned to Judge Swanson 4 days  
 at \$12.00 per day



1 man assigned to headquarters at Morrison Hotel, 10 days at \$12.00 per day, and expenses for carfare, etc, \$37.60,  
 Making a total of \$ 649.60

Alleged services rendered on April 10, 1928,  
 in checking up certain precincts 1,008.00  
 Men to guard certain polling places at the  
 primary election held April 10, 1928, 3,600.00  
 Men to guard the polls in the Election  
 Commissioners Office from 4-10-28 to  
 5-1-28 at \$10.00 per day 9,240.00  
 124 men to guard polling places in  
 country towns at \$12.00 per day, on  
 April 10, 1928, 1,488.00  
 Together with bus fares, cab fares, etc. 87.41

making a total charge of \$16,073.01, of which amount plaintiff admits that the sum of \$4,700.00 has been paid, leaving a balance of \$11,373.01. Plaintiff's position is that "defendant was liable to pay plaintiff's claim because he was a member of an unincorporated voluntary association, known as the National Republican Party, Deneen Group, and because as a member thereof, he either employed plaintiff, or authorized the employment, or ratified the employment."

In Severinghaus Printing Co. v. Thompson, 241 Ill. App.

35, this court said:

"The theory of the plaintiff's cause of action is based upon the principle that if a member of a voluntary association, the objects of which do not contemplate profit or loss in a business sense, expressly or impliedly authorizes a transaction in which an indebtedness is incurred by or on behalf of such association, or if he assents to or ratifies the contract on which such a liability is predicated, he is liable as a principal for the indebtedness. This proposition is well supported by authority. Vader v. Ballou, 151 Wis. 577; Robbins Co. v. Cook, 42 S. D. 136; Wilcox v. Arnold, 162 Mass. 577; Heath v. Goslin, 80 Mo. 310; Dunlap Printing Co. v. Ryan, 275 Pa. 556, 119 Atl. 714; 5 Corpus Juris 1363; 25 R. C. L. 64; 7 A. L. R. 216-218, and note. It is also held that in such cases the liability of the participating, assenting or ratifying members is joint and several."

Except for certain letters written by defendant to the plaintiff, we find nothing in the record to justify plaintiff in concluding that the defendant either employed 12 of these men, or ratified such employment. On April 13th, 1928, the defendant wrote a letter to plaintiff in which he said, among other things, "I was

1. The first part of the report is devoted to a general description of the work done during the year.

2. The second part contains a detailed account of the results of the experiments carried out during the year.

3. The third part is devoted to a discussion of the results of the experiments and to a comparison of the results with those obtained in previous years.

4. The fourth part contains a summary of the work done during the year.

5. The fifth part is devoted to a discussion of the results of the experiments and to a comparison of the results with those obtained in previous years.

6. The sixth part contains a summary of the work done during the year.



pleased with the work you did during the campaign. Sometime after Congress adjourns, I shall be pleased to see you and talk with you about certain conditions in Chicago." On May 13th, 1928, defendant wrote another letter to plaintiff in which defendant thanked plaintiff for his thoughtfulness and courtesy, and among other things, said: "You did not render me a bill for the services at the Granady funeral. I should be pleased to have you send it to me, unless it has been paid by the campaign committee." On July 28th, 1928, plaintiff wrote to defendant, in which he said he had not been paid for his services at the April Primary, 1928, and stated to defendant that he had sent a letter to Mr. Healy regarding his bill, and that Mr. Healy should arrange to pay plaintiff at least a part of such bill. In reply to this letter on August 23rd, 1928, the defendant wrote plaintiff, and among other things, said: "I shall call a meeting of our friends early during the coming week, and shall submit your letter to them. It will receive prompt consideration." On October 30th, 1928, defendant wrote plaintiff, stating, "I shall take up with Mr. Healy the matter of the unpaid bills for the last primary. I had expected to do so today, but Mr. Healy was not at our meeting. I wish to have all of our debts paid before election." The major portion of the bill is for services alleged to have been rendered by plaintiff in placing men at certain polling places in the city of Chicago and County of Cook on primary day, and for men alleged to have been furnished in the office of the Election Commissioners of Chicago after the primary to guard the count.

Defendant in his testimony stated that he was not at the Morrison Hotel xxxxxxxxxx when plaintiff, in his testimony, states he was employed. He admitted that plaintiff was with him on several days during the primary campaign, denied that he requested the plaintiff to send men to the Election Commissioners Office on the



night of April 10th, 1928, or that he authorized any one for him to make such request, and denied that he, in his own behalf or on behalf of any organization, employed men to guard the polls on the day of this election, or that he authorized any one for him to furnish such men. The statement by plaintiff that Jacob D. Allen and Harry Hoff, as and for defendant, employed defendant to render the services as alleged by plaintiff, is denied by both Hoff and Allen and by defendant Deneen. The so-called schedules purporting to show the number of men employed, and the time of employment of each of such men at the various primary polling places in the city of Chicago and the country towns at the polls during the election are so indefinite that even if they had been admitted in evidence, they would not have established the fact that they were so employed through defendant's authorization. So far as the alleged personal services alleged to have been rendered defendant are concerned, which consisted in accompanying him to various places, the record indicates that plaintiff has been fully paid for all such services. An extensive hearing was had before the trial court, the court had ample opportunity to see the witnesses and weigh their testimony, and we see nothing in the record which would justify us in reversing the judgment. It is, therefore, affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.



36768

LYMAN B. MANSELL,

Plaintiff, Appellant,

v.

LORD LUMBER & FUEL CO., a corporation,

Defendant, Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

276 I.A. 595<sup>4</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of a judgment for costs entered against him in a suit against defendant for moneys charged to be due him under an alleged contract entered into between the parties for the conveyance of real estate by defendant to plaintiff. The court directed the jury which heard the case to find the issues for defendant.

It is charged by plaintiff in a special count in his declaration in substance that on June 8th, 1930, defendant, through its authorized agent, one W. A. Draper, by a contract in writing, agreed to sell and convey to plaintiff certain real estate for a price of \$18,000.00, subject to certain existing leases, taxes and assessments levied after 1929, and to any unpaid special taxes and assessments not yet made; also subject to a first mortgage of \$5,500.00, with interest, which plaintiff agreed to pay; that plaintiff should pay \$1,000.00 down and an additional \$1,000.00 on June 30th, 1930, to be held as earnest money for the parties mutual benefit; that the balance of \$10,500.00 should be paid by plaintiff within five days after the title should be examined and found good; that all the payments were to be made at the office of McClintock & Prouty, real estate agents in La Grange to be subsequently paid to defendant when proper deed of conveyance was delivered to the plaintiff, and that if plaintiff failed to perform then this earnest money was, at the vendor's option, to be forfeited to the vendor as liquidated damages, and the contract held to be void.



It is alleged that plaintiff made the payments of \$2,000.00 earnest money, duly tendered the \$10,500.00, as agreed, and had always been ready and willing to perform the contract, but that defendant by a writing, dated August 5th, 1930, repudiated the contract and refused to perform, to the damage of plaintiff in the sum of \$40,000.00, that being the value of the property in question on the date of the contract, over and above and in addition to the amount which plaintiff agreed to pay therefor. Plaintiff also filed the common counts.

Defendant's pleas were the general issue, and a special plea in which it averred in substance that it did not make and deliver the writing<sup>in</sup>/the declaration mentioned; that W. A. Draper, who signed defendant's name to said alleged contract, did not have the right, power or authority to sign defendant's name thereto. Notice of special defenses was also filed to the effect that plaintiff did not make the alleged contract set forth in the declaration and each count thereof, and in addition stated that the alleged contract, if made, contained a mutual mistake and that plaintiff had caused a decree to be entered upon an admission to that effect in the case of Lyman B. Mansell v. Lord Lumber & Fuel Co., a corporation, et al., in the Circuit Court of Cook County, No. B-204607, and by reason of such admission defendant claimed that a different contract was made with it than the contract set forth in the declaration, and further that plaintiff did not suffer any damages by reason of<sup>the difference in</sup>/the value of the land.

From the opinion of the Supreme Court in Mansell v. Lord Lumber & Fuel Co., 348 Ill. 140, being the case above referred to heard on appeal, it appears that after the contract between these parties had been entered into, as alleged, plaintiff here filed a bill in the Circuit Court of Cook County for its specific performance,





that an answer to this bill was filed by defendant, together with a cross bill, in both of which it is alleged, in substance, as stated by the Supreme Court in its opinion, that defendant here, "acting through W. A. Draper as its agent, entered into negotiations with appellee and Ben Dial and agreed with them to sell said property to appellee for \$18,000, payment to be made by appellee as alleged in his bill, but that it was the agreement of the parties to the contract that appellee was to accept the title to the property subject to all general taxes levied after the year 1929 and subject also to all installments of special assessments falling due after the execution of the written contract of sale, and that the general taxes on the property for the <sup>year</sup> 1930 'should be prorated as of the date of delivery of the deed'; that by a mutual mistake of the parties the written contract, which was drafted by a real estate broker who represented both appellee and the vendor and executed by the parties, failed to provide that the property was sold subject to all installments of special assessments which would fall due after the execution of the contract and failed to provide that the general taxes on the property for the year 1930 were to be prorated as of the date of delivery of the deed, and that the company was ready, willing and able, and had offered, to perform and carry out the agreement <sup>as actually</sup> intended to be made by the parties. In that case, the cross bill of defendant here and there prayed that the written contract between the parties be reformed so that it will contain the omitted agreement of all the special assessments that would fall due after the date of the contract, and that the general taxes for the year 1930 should be prorated as of the date of the delivery of the deed to the premises."

The Supreme Court in its opinion also states "that it clearly appears from the evidence in the record that the company (defendant here) authorized Draper to sell and deed the property in question for the net sum to the company of \$12,500 to be paid by the



purchaser, and that for that net sum the buyer was to accept a deed to the premises subject to the amount due on the \$5500 mortgage and to the \$7000 or more of the special assessments that were to become due after the delivery of the deed and which were for local improvements that were completed before the contract of sale was made, and that the general taxes then levied and unpaid and the interest on the \$5,500 mortgage and the rents of the premises were all to be prorated as of the date the contract should be consummated. The written contract clearly expresses all of the terms of the contract that Draper was authorized to make by the company except the provision that appellee was to assume and pay the \$7,000 or more of the assessments that were to become due after the deed was delivered and except the provisions that the general taxes then levied and the interest on the \$5,500 mortgage were to be prorated." The court there held that "while the evidence does show, beyond all reasonable doubt, that the written contract does not contain all the material provisions of the contract verbally agreed upon by the parties, our holding must be that the evidence does not clearly and satisfactorily show that the company is entitled to have the relief prayed for by it in its cross-bill, and that it is not equitably entitled to a rescission or cancellation of the contract. Equity will reform an instrument only where the mistake is one of fact and is mutual and common to both parties. (Schaefer v. Henze, 337 Ill. 41; Skelly v. Ersch, 305 id. 126.) The evidence of a mutual mistake must also be of a strong and convincing character and such as will strike all minds alike as being unquestionable and free from reasonable doubt. A probability or mere preponderance of the evidence is insufficient. Chris v. Rake, 287 Ill. 619; Anderson v. Stewart, 281 id. 69." Also, that "under the evidence appellee (plaintiff here) is not entitled to have specific performance of the contract. The remedy of specific performance of a contract is not granted as an absolute right, and it will be denied where the



contract was entered into because of fraud, oppression or misrepresentation or in a case in which it would be inequitable to enforce the terms of the contract. Where application is made to a court of equity for the specific performance of a contract the relief will sometimes be denied where a mistake has been made in entering into the contract and the facts and circumstances shown by the evidence are not sufficient to warrant the reformation or cancellation of the contract."

As we view it, the result of the Supreme Court holding is that under the showing made there neither the complainant, the plaintiff here, nor the defendant here and in that case, were entitled to the remedies there sought, - the complainant to a specific performance of the contract as drawn and signed, nor the defendant to a reformation of the contract, and a specific performance of it as reformed. The Supreme court did say that "appellee (plaintiff here) should, therefore, be left to pursue his remedy at law in case he should be advised that he has such a remedy."

The question presented here as to plaintiff's right to recover the \$3,000.00 paid as earnest money was of course, not raised in the Supreme Court so that whatever view may be taken as to the other questions involved, that question is still to be determined from whatever evidence regarding it may be adduced. It is our opinion from the record here that the cause should have been submitted to the jury.

The judgment of the Superior Court, is therefore, reversed and remanded for a hearing upon the issues presented by the pleadings.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND HEBEL, JJ. CONCUR.



36777

MIKE BIALKA,

Appellee,

v.

GUY A. RICHARDSON, as Receiver of  
Chicago Railways Company, a corporation,  
et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

276 I.A. 596<sup>1</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of a judgment against them in a suit by plaintiff for injuries alleged to have been received by him through the negligence of defendants. The cause was submitted to a jury, which returned a verdict in favor of plaintiff for \$6,000, which was remitted to \$5,000, and a judgment for that amount entered.

The questions raised here are that plaintiff did not prove his case, as set forth in the first, third and fourth counts of his declaration; that the defendants were without negligence in the premises, and that the court erred in refusing one of the instructions offered by defendants. No question is raised as to the fact that plaintiff was injured, as to the extent of his injuries, or as to the amount of the verdict and judgment. In all the four counts of the declaration, it is charged that defendants operate a street railway upon the streets of Chicago, including Milwaukee avenue. The cause was submitted on the first, third and fourth counts. It is charged in the first count that "defendants carelessly and negligently controlled, operated, propelled and used their said northwest bound street car at and along 2049 North Milwaukee avenue in a crowded and overloaded condition with passengers upon the steps of the rear platform, to wit; the plaintiff and others; that by reason of

Opinion filed June 30, 1934



the carelessness and negligence of said defendants, plaintiff was then and there caused to and did unavoidably fall from said steps down and upon the ground." The allegation in the third count is that "defendants then and there carelessly and negligently caused the said street car to move, jerk, jolt and sway backward and forward as the same ran into and collided with another vehicle while so carrying the plaintiff upon the steps; that by reason of said collision, plaintiff was then and there thrown with great force and violence against the parts of said car and off of said car and down upon the street." The allegation in the fourth count is that "defendants carelessly and negligently permitted, allowed and suffered said street car, the rear platform and steps thereof, to be so heavily loaded and packed with passengers that plaintiff was unable to get through, upon and into said street car, to-wit; same was overcrowded, preventing plaintiff from further entering upon and into said street car, that as a direct result and in consequence of said overcrowded, packed and loaded condition, plaintiff was caused and did unavoidably fall and was thrown, jarred and hurled from said steps of said platform." Defendants filed a plea of the general issue.

Plaintiff testified in substance that on December 9th, 1930, he was in the real estate business; that he started to go home, and when he got to Milwaukee and Armitage avenues to take a car, "there were people there. There were people on the car and on the street waiting for the car. I was waiting, one car passed, conductor don't open the door, another car passed, don't open the door, and third car stopped and conductor opened the door and everybody get on. I mean everybody wanting to get on, I got on too. About four people went to the car before I did. The door was closed until he came to a stop and the door opened and four people got on



the car. Then I got on. I got on from the back, on the step of the car. I saw the conductor. I was on the first step with both feet, when I was holding the railing. The railing I was holding was in the middle. I give a transfer to the conductor. He took it.

Q. Did you hear the conductor say anything to you?

A. He don't say anything to me.

Q. Or to anybody else about not getting on the car?

A. No.

I saw the conductor pull the rope, then the car started to go. Goes along a half block and then accident. I was on the steps standing, a hold of the railing. I don't know who hit me. I fell on the ground, broke the leg."

No question is raised, but that plaintiff was a passenger, and that defendants received his fare, as stated.

Felix Zurawicz, a witness for the plaintiff, testified in substance that he was on the car in question and a witness to the accident; that the street car was crowded to the limit on the platform; that the door on the rear platform was open after it came to a stop; that he got on the car step; that nothing was said by the conductor that they could not take any more passengers; that when they got about half way down the block the car gathered speed until it was going fast; that when he was about half way down the block there was a crash of falling glass, which the witness could hear, and that he was thrown backwards into the street; that he was facing the street car and did not see the automobile.

Elmer Neubauer, the conductor of the car in question who stood on the back platform testified in substance that he saw the man who was hurt attempting to board the car, that the man did not get up on the platform, but remained on the steps, that there was no room on the platform itself and no room inside the body of the car for more



passengers; that he called out that the car was crowded and that there was another car right behind; that there was no jerk or jolt of the car as it started; that as they were riding along he saw an automobile on the side of the street between the car and the curb; that when he first saw the automobile, it was going north about 50 or 60 feet back of the street car and traveling about 30 miles an hour, about double the speed that the street car was going; that the automobile continued to gain on the street car until it came up by the side of where the witness was standing, and that at that time, there were 2 or 3 feet of space between this automobile and the men who were on the step; that when the automobile got to the center of the street car, the rear end of it was just in front of the back platform and the steps; that he heard a noise, the automobile turned and the back end of it hit the street car steps and the folks on the step were knocked right out into the street. He stated that along Milwaukee avenue at the place of the accident, there are automobiles parked along the curb. This witness stated that when the automobile in question had passed the street car, it hit a machine that was parked at the curb along the street, which happening turned the automobile toward the street car.

The evidence indicates that the distance between the curb at and near the place of the accident and the outer rail of the street car on Milwaukee avenue is from 15 to 20 feet, that the body of the street car overhangs the tracks at least two feet, that the step extends a few inches beyond the side of the car and that there were automobiles parked in a row along the curb, and that the street was bumpy along and about the place of the accident.

Defendants contend that it was negligence for the plaintiff to ride on the step of a crowded car, and that it was not negligence per se for the defendants to allow him to do so; that inasmuch as defendants had no control over the automobile, they cannot be



charged with having done, or failed to do, anything which caused, or might have prevented, the automobile from coming in contact with the step, and that plaintiff was guilty of contributory negligence in taking his place on the step of the car, as the evidence shows he did.

In North Chicago St. R. R. Co. v. Polkey, 203 Ill. 225 the action was for the death of plaintiff's intestate, caused, - as said by the court in its statement of the case - as follows: "Deceased was killed in the afternoon \*\*\* while standing on the foot-board of defendant's grip car and passing through the La Salle street tunnel in the city of Chicago. There was a parade \*\*\* and a large crowd gathered. When a train (of cable cars) finally came along it was crowded, and the boys boarded the street car at the street corner on the right hand side. Rucks (decedent) and most of the boys with him stationed themselves on the running board at the side of the grip car. \*\*\* In passing through the tunnel, the walls of which were of rough stone, were quite near to the car, the witnesses for the plaintiff giving different estimates varying from 3 to 12 inches from the running board, or the foot board. He (decedent) \*\*\* fell to the floor of the tunnel, suffering the injuries from which he died." From the statement made by the court, it appeared that the decedent was in the act of reaching for his fare when he was struck by the wall of the tunnel and thrown from the car and killed. In commenting on the case, the Supreme Court said:

"It cannot be said to be negligence, as a matter of law, under all circumstances, for a carrier of passengers to permit a passenger to stand upon a footboard. It has been held that the courts will not declare it negligence, as a matter of law, for a passenger to stand in an exposed position of that kind. (North Chicago Street Railroad Co. v. Williams, 140 Ill. 275; Chicago and Alton Railroad Co. v. Fisher, 141 id. 614; Lake Shore and Michigan Southern Railway Co. v. Kelsey, 180 id. 530.) It would seem to follow that it is not negligence per se, under all circumstances, for a carrier to allow a passenger to stand in

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such a place. Whether it is negligence on the part of either in a particular case is a question of fact, but if no seat is furnished and the carrier permits a passenger to ride in that way, the carrier assumes the duty of exercising the care demanded by the circumstances."

In Math v. Chicago City Ry. Co., 243 Ill. 114, cited by defendants, the Supreme Court said:

"The conductor received his (plaintiff's) fare, and although he was told to step inside and take a seat he was permitted to ride on the foot-board as a passenger. The foot-board is not furnished for ordinary use in riding on cars, but it is universally known that there are times when street cars are so crowded with passengers that some are compelled to ride on the foot-board or not reach their business or homes at all. Such conditions furnish an excuse for standing on a foot-board, so that there is no rule of law that standing in such a place constitutes, in itself, negligence on the part of a passenger. (North Chicago Street Railroad Co. v. Polkey, 203 Ill. 225.) If the circumstances are such that standing on the foot-board is an act of carelessness on the part of a passenger, or there is a failure to exercise such care as persons of ordinary prudence would exercise in the same position, there can be no recovery. (Hewes v. Chicago and Eastern Illinois Railroad Co. 217 Ill. 500.) The fact that a street car is crowded so that a passenger must stand on the foot-board if he rides at all does not render the foot-board a safe place to ride any more than if the car were empty. The defendant having accepted Rietzl as a passenger on the foot-board became bound to exercise toward him the high degree of care required of carriers of passengers, and the more dangerous the position of a passenger, if it is assented to by the carrier, the greater precautions the carrier is bound to observe. At the same time the law imposes on the passenger the duty of observing for his own safety the degree of care that a person of ordinary prudence would observe while riding on a foot-board, and it is obvious that the attention of the passenger to the surroundings and precautions to avoid danger would be greater than when occupying a seat in a place of comparative safety. The attention and circumspection to avoid injury required of both parties is to be measured by the situation of the passenger and the dangers connected therewith."

In Alton Light and Traction Co. v. Oller, 217 Ill. 15, we find the following:

"The servants of the appellant company invited passengers to occupy the car beyond its capacity, and knowingly permitted, if they did not induce, passengers to stand on the platforms and steps of the car. In such case the carrier assumes the duty of exercising, for the protection and safety of the passengers, that degree of care that is demanded by the circumstances. (North Chicago Street Railroad Co. v. Polkey, 203 Ill. 225.) The obligation of a common carrier, which rested on the appellant company, was to do all that



human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road, to convey appellee and the other passengers in safety to his and their destination.\*\*\* Whether it was negligence on the part of the appellee, as a passenger, to stand on the steps or platform of the car was a question of fact for the decision of the jury, (North Chicago Street Railroad Co. v. Polkey, supra,) and not of law to be determined by the court. The cause was properly submitted to the jury."

There seems to be little dispute as to the facts surrounding the accident in this case, or as to what caused it, and under the rule laid down by the Supreme Court in numerous cases, the question as to whether defendant was guilty of negligence, or whether plaintiff was guilty of such negligence as contributed to the accident, are questions for the jury to determine from the evidence and not for this court to pass upon. The statement of plaintiff that the conductor of the car accepted plaintiff's fare, made plaintiff a passenger under conditions then well apparent to the conductor from his own testimony.

Defendants also assign error upon the refusal of the court to give the following instruction:

"The jury are instructed that on, and along prior to December 9, 1930, there was in full force and effect in the City of Chicago, an ordinance that read, and reads, in part as follows: 'Section 72-Riding on Running Boards - It shall be unlawful for any person to ride upon the fenders, running board or outside steps of any vehicle.'

If the jury believe, from the evidence in this case, that the plaintiff, at and just before the time of the accident in question, was violating the said ordinance, and if you further believe from the evidence, under the instructions of the Court, that he was thereby guilty of negligence which proximately contributed to his injury, he can not recover from defendants in this case."

The ordinance referred to is Section 2003 of the Revised Chicago Code of 1931, which is a part of Chapter 38 of such Code, entitled, "Traffic", and a reading of the entire chapter indicates that neither the portion of the ordinance referred to in the instruction, nor any other portion of it, has to do with street cars or street railways,



but to motor and other vehicles traveling on the highways. Chapter 21 of this Code has to do with railways of all sorts, including street railways. Article 5 of Chapter 21 of this Revised Code in Section 1157 thereof provides, paragraph "(j) for the purpose of providing comfortable transportation of passengers without crowding, the number of passengers to be carried in any street railway, elevated railway or steam railroad car shall not exceed the seating capacity of such street railway, elevated railway or steam railroad."

We are of the opinion that the court was not in error in refusing this instruction, and that the court was justified in submitting the case to the jury on the declaration. The questions raised by defendants as to whether or not defendant was guilty of negligence, or whether plaintiff was guilty of contributory negligence present questions of fact for the determination of the jury. The jury heard the witnesses, and had full opportunity of passing upon these questions, and under the circumstances, we do not feel that we are justified in disturbing the verdict and judgment. The judgment is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.



36817

DORFMAN & ROSEN, INC.,  
(Plaintiff)

v.

A. MIRSKY,  
(Defendant)

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 596<sup>2</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago for \$380.79 and costs. It is charged by plaintiff in his statement of claim that plaintiff sold and delivered to defendant certain goods, wares and merchandise to the amount of \$304.09, for which defendant did not pay, and that defendant gave plaintiff a check for \$76.70 in payment of other goods, wares and merchandise sold by plaintiff to defendant, which check was returned unpaid to the plaintiff because of the failure of the bank upon which it was drawn. Defendant denies that he purchased the goods, as alleged by plaintiff, or that he gave plaintiff the check in question.

Sam Rosen testified that he was president of the plaintiff company, wholesale grocers in the city of Chicago, and in substance that prior to May, 1931, the corporation had been selling groceries to defendant Mirsky, who operated a grocery store at 3149 Indiana avenue, Chicago; that up to about the last mentioned date, the dealings between the parties were on a cash, or C.O.D. basis, and that one J. Nathanson was in charge of the business, placing the orders and paying by checks signed A. Mirsky, by J. Nathanson, and that such checks prior to that time had always cleared; that about May 19th, 1931, Nathanson requested the witness to give the defendant institution credit for the goods purchased; that the witness then talked with defendant Mirsky at the store at 3149 Indiana avenue, and that Mirsky told the witness that Nathanson was operating the store for the defendant, and that defendant would pay all bills incurred for merchandise delivered at the store; that thereafter deliveries were

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(111)

Opinion filed June 30, 1934



made on credit, and that some of them were paid in the course of business. Plaintiff exhibited delivery receipts for the merchandise so delivered, and stated that on June 10th, 1931, he received a check for \$76.70, which he exhibited to the court, drawn on the Lincoln State Bank, signed A. Mirsky by J. Nathanson, agent, which<sup>bank,</sup> at the time of its presentation, had ceased doing business; that after the check had been returned, and the time for the payment of the goods delivered had passed, he called on Mirsky, who promised to make the check good, and that he, Mirsky, would make payments on the overdue account and asked the witness to be patient with him.

Defendant Mirsky testified in substance that he had never met Rosen and did not have the conversations with him, as stated by Rosen; that he did not tell Rosen that Nathanson was operating the store for him, or that he would pay for the goods delivered to the store, and that he never had any interest in the store.

After Mirsky had testified, Rosen was again called to the stand and identified defendant Mirsky as the person with whom he had the conversations testified to, and again stated that Mirsky had said that he owned the store at 3149 Indiana avenue, operated for him by Nathanson, and that he, Mirsky, agreed to pay the check in question.

The only questions involved were questions of fact, and as the court heard the evidence, saw the witnesses, and as the finding is not against the manifest weight of the evidence, we see no reason for disturbing the finding and judgment. The judgment is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

[illegible]

36908

JOSEPH MOSTAKO,

Defendant in Error,

v.

J. V. FINCHER, doing business as  
LINDEK NASH SALES and EARL CALL,

Plaintiffs in Error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

276 I.A. 596<sup>3</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error, a reversal is sought of a judgment of the Superior Court of Cook County for \$8,900, entered in an action brought by plaintiff to recover damages alleged to have been sustained by him through the negligence of defendants. The cause was submitted to a jury. No question is raised on the pleadings. The points raised here by defendant are that plaintiff was guilty of contributory negligence, that the verdict of the jury was against the manifest weight of the evidence, that the court erred in giving certain of plaintiff's instructions and in refusing to give certain instructions offered by defendants, that plaintiff's attorney made an unfair argument to the jury, and that the verdict and judgment are excessive.

On June 29th, 1931, defendant Call, an employe of defendant Fincher, was driving Fincher's automobile south on the west side of Halsted street toward the intersection of Halsted and 14th streets in the city of Chicago Heights, and plaintiff was riding his motorcycle north toward the same intersection on the east side of Halsted street. Approaching this intersection from both the north and south of 14th and Halsted streets is a four lane highway. At the intersection of these streets, the two machines collided, and as a result of the collision plaintiff was seriously injured.

Plaintiff testified in substance that on the day in question he was driving north on the east side of Halsted street at



a speed of about 20 miles an hour; that as he approached 14th street, he noted that the signal showed a green light for north and south traffic; that the vehicles on 14th street were standing still; that when he first saw defendant's car, both his motorcycle and defendant's car were about 40 feet distant from the respective north and south boundaries of 14th street; that he was half way across 14th street when defendant's car made a sudden turn, when it was about 10 feet from plaintiff's motorcycle, and that defendant's front bumper hit plaintiff's motorcycle. Plaintiff also testified that he was about 10 feet from the northeast corner of the two streets, where a traffic light is located, when the accident happened; that he found himself in the street, and that "I noticed the condition of my leg; I seen it hang over to one side like a piece of meat; I was in agony."

William D'Maico testified in substance that on June 29th, 1931, at and immediately before the time of the accident in question, he was in his automobile headed west on the north side of 14th street, waiting for the traffic signal; that the light on the northeast corner of the intersection near the witness was about one foot inside the curb; that he saw the motorcycle a moment before the collision headed north; that 14th street is about 40 or 50 feet wide; that defendant's automobile, when it started making the turn, had been going south, and that it made a sharp turn, and that at this time, plaintiff's motorcycle was headed north going 20 or 25 miles an hour; that the witness had been driving an automobile for about 20 years; that the collision occurred on the northeast corner of the intersection in front of the witness, about 10 or 15 feet; that the motorcycle was smashed and the boy (plaintiff) was on the pavement. The witness stated that he got out of his car and that "we picked the boy up and took him to a hospital, and that at that time, plaintiff's leg was broken." On cross-examination, as to the situation of defendant's automobile at the time of and immediately before the collision, this witness



testified that "the automobile did head east. As it straightened out and headed into 14th street, the motorcycle was about 10 or 12 feet south of it. The car was only 4 or 5 feet away from the light I am talking about. When the automobile turned east into 14th street, the motorcycle was already practically across 14th street; that at that time it was about 4 or 5 feet from the curb on the east side of Halsted street \*\*\* going straight until it got hit." This witness further stated "that the collision occurred about 4 feet west of the light on the corner (the northeast corner) \*\*\* and that the stop light was 4 or 5 feet from where the accident happened."

Valentine Gurney testified in substance that he saw the collision in question; that at the time of the collision he was standing at the southeast corner of the intersection of Halsted and 14th streets; that he saw the motorcycle coming up to the intersection going north, and at that time the motorcycle was close to the east curb of Halsted street; that at the time of the collision, the motorcycle was going about 15 or 20 miles an hour, and at the same time defendant's automobile was headed in a southeasterly direction. He further stated in substance that defendant's car made a left hand turn and ran into the motorcycle.

The only occurrence witness produced by defendant was Earl Call, one of the defendants and the driver of the automobile owned by Fincher. This witness testified in substance that he was traveling not more than 5 miles an hour when he came to the corners of the intersection of the streets in question; that he came into the intersection on the inside lane, and saw no one approaching from the south, and that he, meaning plaintiff, cut in in front and hit the bumper.

Defendants complain of the following argument made by plaintiff's counsel:





"Every one of us in life may, at some time or other, have a little lapse of thought, a little standstill of the mental processes, a little - just a blank come across us, but in order that a man's carelessness or his mistake, if any, can be foisted upon him to beat him in a lawsuit as a plaintiff, it must be the thing that produces the accident, any general negligence -

Mr. Vogel: I object to that as not a proper statement. It is not necessary that it be the sole contributing factor, if it aids or proximately helps to bring about the accident.

Mr. Hulbert: Yes, but just a little deviation from the exercise of the strictest military caution would not defeat the plaintiff's right of recovery. What he did must be the proximate cause of the accident and what he did not, a little bit of testimony from this man and that, and finally put together and make something out of it."

and suggest that it was calculated to mislead the jury, and in effect constituted an invitation to the jury to compare the negligence of the plaintiff and defendants. We have read the quoted statement of plaintiff's counsel very carefully, and are quite sure that it could not have been prejudicial.

Defendants also insist that the court was in error in refusing the following instruction:

"Contributory negligence on the part of the plaintiff is a bar to recovery in a case of this kind, and this is true whether or not the defendants were negligent and if you believe from the evidence that the plaintiff was negligent at the time of or immediately before the accident in any way which contributed to or helped to bring about the accident and any injuries which he sustained, there can be no recovery in this case and your verdict should be not guilty.

The Court instructs you that you are not warranted in comparing the negligence of the plaintiff and of the defendant Call, if any, to determine which was guilty of the greater degree of negligence, but if you find from the evidence under the instructions of the Court that the plaintiff was guilty of any want of ordinary care which caused or helped to cause the accident here in question, and the plaintiff's injuries, if any, then you should find the defendants not guilty.

You are instructed that no greater duty rested upon the defendant, Call, in this case to avoid injury to the plaintiff at the time of and just before the collision than rested upon the plaintiff. And if you believe from the evidence that the plaintiff and the defendant had equal opportunity each to see the other before the accident and to avoid the same, there can be no recovery in this case."

On behalf of defendants, the court read to the jury 17 instructions,



and, as we read them, they cover every phase of the case as presented by the refused instruction.,.

Alfon L. Cornett, a physician and surgeon, testified in substance that he examined the plaintiff in the emergency room of the hospital to which plaintiff was taken on the day of the accident, and that "I found his leg badly crushed and macerated, very profuse bleeding, large laceration in the lower end of the leg with some particles of bone protruding through the opening, wound very dirty and patient in extreme shock. A fracture of both bones below the knee. The lower end of the tibia and the fibula with a great number of loose pieces. The tibia is the large bone known as the shin bone, the other is the fibula lying to the outside." He stated that after cleaning the wound, he removed a large number of loose particles of bone approximately one and one half inches in length, which were shattered from the large bone, the tibia, and placed drainage in the wound about the leg and put the leg in a wire cast; that the patient was in extreme shock over a period of at least a day and a half due to loss of blood; that on the first examination the foot had no location, it was just so flaccid it would turn and fall and turn out at right angles, there was no bony attachment whatever, the bony structures were destroyed with the pieces missing, and there was no connection between the ends of the bone; that considerable infection developed after the fifth day. This witness also testified that plaintiff's wound was still open on October 10th, following the accident, and was discharging serum and pus; that he found persistent inflammation of the bony structures, and that plaintiff was in bed about three months, during which time he dressed the leg about once or twice a day; that plaintiff was in the hospital about three weeks before he was discharged, walking on crutches. This witness also testified that the wound gradually healed, and that



the injured leg was abnormal in shape and was shorter approximately one inch; that there was a falling outward and forward at the lower portion of the leg just above the ankle, a thickening and enlargement and some swelling. This doctor also testified that he saw plaintiff about a week prior to the trial and found about a one inch shortening in the defective leg, the leg larger than normal and some outward and forward curvature of the bony structures. The wounds were healed. He also testified that in his opinion, the disability was permanent.

Sidney S. Greenspahn, a physician and surgeon, testified in substance that he took certain X-ray pictures of plaintiff's leg on November 3rd, 1931; that the pictures indicated that "in the lower third of the left tibia at a point of about two inches above the ankle there has been a break in the continuity of the bone and shows there is a fracture in that structure, and that this fracture consists of at least four different particles, in medical terms called a comminuted fracture, but there has been a displacement hanging under and overriding the fractured segment." He also testified that he found scars on the plaintiff's leg and ankle, and that they were badly swollen.

An examination of the record indicates that the questions of plaintiff's contributory negligence and defendants' negligence were fully and fairly submitted to the jury, as was the question of the extent and permanency of plaintiff's injuries. The jury was fully and fairly instructed, and we can see nothing in the record which would justify us in interfering with the verdict and judgment. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.



36953

G. VICTOR SANDSTROM,

(Plaintiff) Defendant in Error,

v.

R. M. JOHNSON and FRANK CAULEY,

Defendants.

R. M. JOHNSON,

(Defendant) Plaintiff in Error.

WRIT OF ERROR

SUPERIOR COURT

COOK COUNTY.

276 I.A. 596<sup>4</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, R. M. Johnson, seeks the reversal of a judgment against him and one Frank Cauley for services alleged to have been rendered and materials furnished by plaintiff to them in and about decorating the Clayton Court Building in the city of Chicago. There seems to be no question but that plaintiff did the work and furnished the materials, as alleged.

Plaintiff testified in substance that in the Fall of 1926 he had a conversation with defendant Cauley, to whom he furnished an estimate of the cost of certain work to be done in the building mentioned, and that Cauley told him to go ahead and do the work, which he did; that thereafter he took the first statement of certain amounts due for such work to Cauley, that Cauley wrote out a check and sent him with it to Johnson, who countersigned the check for the amount of the statement, which check was paid; that he followed this procedure during the years of 1927, 1928 and 1929 in the work of decorating the 26 apartments in the building, made statements for <sup>each of</sup> which Cauley gave him a check, and that each of the checks were countersigned by Johnson.

A bill of particulars was furnished by plaintiff to the defendant, and plaintiff testified that all the work had been done and paid for in the manner stated, except the amount of \$2,420.00,

Opinion filed June 30, 1934

each of



for which this suit was brought and for which judgment was entered. Apparently, from the record, this balance remains unpaid. Plaintiff further testified that in the Fall of 1929 Johnson told him that as soon as the taxes were paid on the property, he would sign a check for the balance due.

Defendant Johnson testified that he first met the plaintiff in October, 1926, when the plaintiff came to Johnson's office to get a check countersigned; that he, Johnson, then told plaintiff that he, had a third mortgage on the building and had taken the title as security; that he had nothing whatever to do with the building, the making of repairs, dealing with the tenants, or renting, and that if plaintiff contracted for any bills, he would have to look to Cauley for his payment, that the only reason he was countersigning the checks was that he had to keep the funds from the rent to put into the account to pay for current expenses; that plaintiff came in about once every month to have checks countersigned. He denied that he had ever agreed to pay plaintiff's bills.

A recapitulation of the essential facts shown by the record indicates the following; That the premises in question were conveyed by Cauley to Johnson on July 28th, 1926, and that contemporaneously with the delivery of the deed by Cauley to Johnson, Johnson gave Cauley an option to re-purchase the premises within two years of that date, and also agreed with Cauley that Cauley should manage the building during the period of the option. At that time, Johnson had a second and third mortgage on the property, as security for money due him from Cauley. Johnson's testimony is to the effect that he took title to avoid the expense of the foreclosure of his mortgages. After July 28th, 1926, when Cauley conveyed the premises to Johnson, the building was then mortgaged by Cauley to Johnson and the rentals were deposited by him in a bank account at the Capitol State Bank, which



had been opened by Johnson. These funds could not be withdrawn from this account except when checks were countersigned by Johnson. It also appears that Johnson paid the charges for the operation of the building out of this account, and that out of this fund Johnson was paid on account of his debt due from Cauley about \$9,000, and that Cauley was paid nothing out of the fund. An option given by Johnson to Cauley to repurchase the property within two years and which expired on July 28th, 1928, was never exercised. It also appears that in February, 1929, Johnson assumed the management and control of the premises in question. By the bill of particulars filed in the case, it appears that the materials and labor furnished, for which this suit was brought, was for a period from July 1927, to March, 1929. Johnson appropriated a large proportion of the amounts collected to the payment of the debt due him from Cauley. The record clearly indicates that he and Cauley were engaged in a mutual or joint undertaking, from which each expected to profit. In *Words & Phrases Judicially Considered*, Vol. 4, page 3814, we find the following definition: "If the interests of the obligees is joint, it matters not that the contract in its terms is several." In the beginning, by the operation of this building, Cauley expected to pay his debt to Johnson and receive a re-conveyance of the property. On Johnson's part, he expected to have his debt paid. The building was being operated under the arrangement between the two with these ends in view. After Cauley had conveyed to Johnson on July 26th, 1928, it seems to be not disputed that these two had a distinct understanding as to the management of the building, and the collection and disposal of the rents. The rents went into a bank account controlled by Johnson. He knew that the plaintiff was furnishing the materials and doing the work for which he seeks compensation. We see no reason for disturbing the judgment of the Superior Court, and it is, therefore, affirmed.

AFFIRMED.



36971

HYMAN EPSTEIN,

(Plaintiff) Appellant,

v.

CONTINENTAL-ILLINOIS BANK & TRUST  
CO., a Corporation,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 597<sup>1</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against plaintiff for costs. After the entry of the judgment, and the perfection of the appeal to this court, on May 23rd, 1934, the death of Hyman Epstein, appellant was suggested, and B. M. Epstein, as Administrator of the Estate of Hyman Epstein, deceased, by order of this court was substituted as appellant.

On the 18th day of March, 1930, a petition in bankruptcy was filed in the District Court of the United States for the Northern District of Illinois, seeking to have the Noble Printing Company adjudicated a bankrupt. Subsequently, on March 16th, 1933, in this bankruptcy proceeding, Sam Howard was appointed trustee, and, as such trustee, sold and assigned to Hyman Epstein, plaintiff, the accounts receivable of the alleged bankrupt, among them being a claim against Kaufman & Wolf for \$1,117.25.

R. J. Kowalewski, a witness produced by plaintiff, testified in substance that he was the secretary of the Noble Printing Company, and that the schedules filed in the bankruptcy proceeding bore his signature as official secretary of the Noble Printing Company; that among the accounts receivable, shown in the schedules filed, was the claim against Kaufman & Wolf, Hammond, Indiana, for \$1,117.25, and that the claim of the Noble Printing Company against Kaufman & Wolf had been assigned to R. J. Kowalewski Real Estate Company for moneys advanced by this company to the Noble Printing Company.



William J. Moore, an employee of the Noble Printing Company, and a witness produced by plaintiff, testified in substance that subsequent to March 25th, 1930, he and Kowalewski visited the office of Kaufman & Wolf at Hammond, Indiana, and procured a check from that firm drawn on the First Union Trust & Savings Bank of Hammond, Indiana, payable to the Noble Printing Company, for the sum of \$1,117.25, the amount of the claim of the Noble Printing Company against Kaufman & Wolf, and thereafter presented this check to and procured from the First Union Trust & Savings Bank of Hammond, Indiana, a cashier's check drawn on the Continental Illinois Bank & Trust Company for \$1,117.25, also payable to the order of the Noble Printing Company; that thereafter, Kowalewski placed two endorsements on the back of this cashier's check, one being to "pay to the order of any bank or banker, signed R. J. Kowalewski Real Estate Co., Inc., Chicago;" the other endorsement being "Noble Printing Company." This check dated March 20th, 1930, was paid by the Continental Illinois Bank & Trust Company to Kowalewski on March 27th, 1930. It is the basis of the suit against defendant by Epstein.

The assignment of the "Accounts Receivable" of the Noble Printing Company, bankrupt, including the alleged assignment of the account in question, was made by the trustee in bankruptcy to Hyman Epstein on March 16th, 1933, three years after this account had been paid. This fact is admitted by plaintiff in his statement of claim, when he states that the check in question was given "in payment of the indebtedness then due to said payee." As an "account receivable", it had ceased to exist at the time of its supposed assignment to plaintiff. At the time the bank paid the check, the plaintiff had no interest in the transaction.





We cannot see that by the alleged assignment of this so called "account receivable" made three years after the account had been paid, plaintiff has any right of action against defendant bank. The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

THE UNIVERSITY OF CHICAGO

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36988

LU-MI-NUS SIGNS INC., a corporation,

Appellant,

v.

J. J. ANNES,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 597<sup>2</sup>

Opinion filed June 20, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the Municipal Court of Chicago vacating a judgment against defendant in an action in trover. An action in replevin for the recovery of an electric sign was begun by plaintiff against defendant in the Municipal Court of Chicago on December 15th, 1932. Thereafter, a writ of replevin was issued, served on the defendant personally, and returned by the officer to whom it was delivered on December 19th, 1932, unexecuted. Thereafter, on January 25th, 1933, in an action in trover for the alleged wrongful conversion of the sign, a judgment was entered in favor of plaintiff and against defendant for the sum of \$150.00 the value of the sign. On March 14th, 1933, a conditional judgment in garnishment in a proceeding supplemental to the judgment in trover was entered in favor of plaintiff and against the Annes Restaurant, Inc., a corporation. On the same date, March 14th, 1933, a final judgment was entered against the garnishee. On June 6th, 1933, defendant filed a petition, praying that the judgment in trover entered on January 25th, 1933, be vacated and set aside. On July 25th, 1933, the court entered an order vacating the judgment in trover entered January 25th, 1933. It is from this last order that the appeal herein is taken.

The grounds alleged by defendant in his petition, praying that the judgment in trover be set aside, are in substance as follows: that when the deputy bailiff of the Municipal Court made

Opinion filed June 30, 1934

a demand on defendant for the sign, defendant informed the bailiff that he did not have said property and knew nothing about it, and that the bailiff informed the defendant (petitioner) that he would return the replevin writ; that prior to that time defendant had telephoned the plaintiff and requested plaintiff to remove the sign from in front of defendant's property; that the sign was subsequently removed by someone and that defendant believed, until he was served with a replevin writ, that plaintiff had removed it, and that defendant had been informed that representatives of the plaintiff company did remove the said sign; that between November 18th and December 11th, 1932, defendant was entirely out of possession of the premises in question, and that he, defendant, did not remove or convert the sign in question; that defendant was informed by the deputy bailiff having the writ of replevin, that he, the bailiff, would return said writ, and that defendant understood that no further action would be had, and that the suit would be dismissed; that upon the return date of the writ of replevin, petitioner being absent and not represented in court, plaintiff obtained leave to file a count in trover, and upon the next party hearing a judgment was entered against defendant in the sum of \$150.00.

In plaintiff's answer to the petition, it is alleged that after the entry of the judgment in the action in trover, execution on such judgment was issued, served by the bailiff of the Municipal Court of Chicago on the defendant on February 8th, 1933, and that the execution was returned "no property found and no part satisfied", and that thereafter on March 6th, 1933, the summons in garnishment hereinbefore referred to, was issued. It is further alleged in this answer to defendant's petition to vacate the judgment that the defendant, J. J. Annes, is the person who was personally served with the garnishment summons, and is the president of the Annes Restaurant, Inc., garnishee.

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation and the second section deals with the progress of the work.

2. The second part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work in the field and the second section deals with the results of the work in the laboratory.

3. The third part of the report deals with the conclusions drawn from the work during the year. It is divided into two main sections: the first section deals with the conclusions drawn from the work in the field and the second section deals with the conclusions drawn from the work in the laboratory.

4. The fourth part of the report deals with the recommendations made during the year. It is divided into two main sections: the first section deals with the recommendations made in the field and the second section deals with the recommendations made in the laboratory.

5. The fifth part of the report deals with the summary of the work during the year. It is divided into two main sections: the first section deals with the summary of the work in the field and the second section deals with the summary of the work in the laboratory.

Cahill's Illinois Revised Statutes, 1933, Chapter 37, paragraph 409, provides as follows:

"That there shall be no stated terms of the municipal court, but said court shall always be open for the transaction of business. Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court: Provided, a motion to vacate, set aside or modify the same be entered in said municipal court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ or error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

In Imbrie v. Bear, 230 Ill. App. 155, a situation very similar to that in the instant case prevailed. Judgment was entered for plaintiffs in a suit for goods sold and delivered. Defendant appeared by attorney and filed his affidavit of defense. On the call of the case for trial on May 25th, 1922, defendant was not present and judgment was entered against him. Up to that time, no irregularity in the proceeding appears, and no motion to vacate or set aside or modify the judgment was made within thirty days after its entry. On August 26th, 1922, defendant filed a petition to vacate the judgment, and the order of vacation was entered on September 12th, 1922, and the appeal taken from the order vacating the judgment. In its opinion, the court said: "The petition purports to rest upon that part of section 21 of the Municipal Court Act, (Cahill's Ill. Stat. ch. 37, Par. 409) which confers upon that court the power to vacate its own judgments upon grounds that would be sufficient to cause the same to be vacated by a bill in equity, and charges fraud as the ground





for equitable relief. As grounds of fraud it charges 'that plaintiffs have endeavored to practice a fraud upon the court \*\*\* in obtaining a judgment in a sum far greater than actual damages \*\*\* and are endeavoring to perpetuate that fraud in seeking to enforce the judgment'. It also charges that defendant's attorney practiced a fraud upon him because he refused to render him assistance in the proceeding to set aside the judgment. The petition also sets up that defendant's attorney did not appear at the trial because he was moving his office during the month the case was called, and in doing so lost or misplaced his private calendars and files, and without them had no recollection of the case or paper referring to it, and as a result did not watch the case. \*\*\* Section 21 of the Municipal Court Act (Cahill's Ill. Stat. ch. 37, paragraph 409) manifestly contemplates conferring on such court only such power as a court of equity could exercise in a similar case under analogous proceedings, at least so far as they afford an opportunity for the formation of issues and a hearing thereon. It is an independent proceeding in the nature of a new suit, and not a mere incident to the original suit. The proceedings, therefore, in the absence of any specific statutory direction, should be appropriate to the relief sought (23 Cyc. pp. 947, 948), which require a hearing as to the existence of the grounds on which the relief is invoked. Judgments would stand upon a very insecure foundation if they could be set aside at any time on the mere filing of a petition regardless of the truth of its averments. But the statute manifestly contemplated in conferring such equitable power that it would<sup>not</sup>/be exercised without an opportunity, as afforded in equity, for a hearing as to the existence of the grounds upon which it is invoked." In that case, the court reversed and remanded the order vacating the judgment.

Defendant here had his day in court, and if he had been diligent, he would have had ample opportunity to appear and present



his defense. Not having done so, the court was not justified in setting aside the judgment on the showing made. The order vacating and setting aside the judgment is reversed and remanded with the direction that the court enter such order as may be consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND HEBEL, JJ. CONCUR.

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36943

In re ESTATE OF ALVA C. AUSTIN,  
deceased,

APPEAL FROM

LESTER KULP,

CIRCUIT COURT

(Claimant) Appellant,

v.

COOK COUNTY.

HAZEL AUSTIN, Executrix,

276 I.A. 597<sup>3</sup>

Appellee.

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This action was based upon a claim filed in the Probate Court in the Estate of Alva C. Austin, deceased, upon 70 promissory notes of \$500.00 each, payable monthly, commencing January 15, 1924, and aggregating \$35,000. The claim was not allowed in the Probate Court of Cook County, and judgment denying relief was entered. An appeal was taken to the Circuit Court of Cook County by the claimant. Upon a trial, the claim was disallowed and judgment entered upon the finding of the Circuit Court. An appeal therefrom is before this court.

The claim was for \$35,000 and interest on the 70 notes for \$500 each, executed by the decedent, Alva C. Austin, payable to the claimant, Lester Kulp. From the evidence received, Kulp had been the owner of a lamp-jobbing business which he operated under the name Mid-West Lamp Company. Alva C. Austin during his lifetime, was Kulp's salesmanager. Kulp transferred this business as of January 1, 1923, to Austin, subject to \$12,500 of indebtedness, and it is claimed that Austin gave Kulp a promissory note for \$75,000, payable \$500 weekly, for the purchase of the Kulp business. Austin incorporated the business under its prior trade name, Mid-West Lamp Company, with an authorized capital stock of 1200 shares, which were issued to Austin and his nominees in exchange for the assets of the business.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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It also appears from the evidence that Austin then pledged to Kulp 1190 shares of the capital stock to secure the \$75,000 note.

On June 7, 1923, a petition in bankruptcy was filed against the corporation and a receiver appointed. Austin, the president of the company, negotiated a composition in bankruptcy for the corporation with its creditors. In connection with that composition it is claimed that Austin made a settlement with Kulp of his indebtedness on the \$75,000 note. This settlement was a contract, in writing, dated August 14, 1923. By the terms of this contract, Austin's indebtedness was reduced to \$35,000, which sum was evidenced by the 70 notes in suit for \$500 each, payable monthly beginning with the following January, 1924. Austin was given the privilege of prepaying the notes at a discount of ten per cent for the unexpired period until maturity. The contract also provided that Kulp should return to Austin the 1190 shares of stock of the Mid-West Lamp Company in his possession, and Kulp was to take back in lieu thereof 560 shares of the stock of this company.

Subsequently, Austin died, and a claim on these notes was filed in his estate in the Probate Court, and this is the matter now before us for consideration.

The defense offered a witness, Elizabeth Ginsburg, a stenographer working for Kulp both before and after the transfer of the business to Austin, who testified that she overheard two conversations between Austin and Kulp, the first to the effect that Austin would not be called upon to pay the \$75,000 note, the second to the effect that he would not be called upon to pay the \$35,000 of notes.

It does not appear from the evidence that Austin has paid any sum on account of the notes from the day they were executed, and no claim seems to have been made until after his death, when Lester Kulp filed his claim upon the notes aggregating \$35,000.





Elizabeth Ginsburg testified that the first conversation she heard took place in the office of the business at 143 West Austin Avenue; that in that conversation Kulp said to Austin the business was greatly in debt; that he had decided to organize a corporation, to which he would transfer the business, and that he wanted Austin to subscribe for the stock and to give him, Kulp, his personal note for \$75,000, which should be secured by a pledge of the stock of the company. This witness further testified that Kulp said the transaction would be only an accommodation to him; that he was doing it merely to unload his indebtedness onto the company, and that Austin would never be required to pay the \$75,000 note. He told Austin, according to the testimony of this witness, that he was exploiting a new article, a theft-proof lamp, about which he and others were greatly excited and from which they expected to make a great deal of money, and that if Austin could not make a success of the new company he would be able to give him a good job as salesman with his theft-proof lamp company. Austin at first hesitated but finally agreed to co-operate in this plan.

Elizabeth Ginsburg further testified that she overheard a second conversation, which was just prior to the making of the settlement contract of August 14, 1923. She said that Kulp was located in the London Guarantee Building, 360 North Michigan Avenue, where the theft-proof lamp company had its new offices. Kulp, she said, told her to call up Austin and ask him to come to Kulp's office, and he told her also to listen in on the conversation they would have. She showed Austin into Kulp's office, and she placed herself behind a partially open door which led from Kulp's office into her office. She gave a detailed description of the office. She said that the men spoke loudly enough to be overheard, and that she heard Kulp say to Austin he still feared the creditors of the



corporation would make further investigation and he thought it would look better if Austin would give him \$35,000 of notes in place of the \$75,000 note. Austin's reply was that he disliked giving new notes and that Kulp might as well keep the note which he already had, but upon Kulp's insistence, Austin agreed to give the new notes. Kulp said he would have a contract drawn to that effect, and Austin departed.

There is evidence in the record that Kulp did not move into the offices where this conversation is alleged to have occurred until seven months afterwards.

There is also evidence in the record offered by the defense that a witness named Thomas S. Booth had two conversations with Kulp, the first of which was before the company was organized as a corporation, and in that conversation Kulp told Booth the transaction between Austin and himself was merely an accommodation to him; that it was merely for the purpose of unloading his indebtedness onto the corporation, and that Austin would never be required to pay the \$75,000. The second conversation between Kulp and Austin was on September 14, 1923. The parties were present for the purpose of making a five-party contract. At that time, Booth spoke to Kulp about the note, and Kulp told Booth that he did not expect Austin to pay the \$35,000 of notes any more than he expected him to pay the \$75,000 note.

The defendant contends that the finding of the trial judge was manifestly against the evidence and against the weight of the evidence, and that the testimony as to the particular words used in a conversation which occurred long prior to the trial should be received with great care and caution, and even where a witness' testimony is uncontradicted, nevertheless, if it is contradictory of the laws of nature or human experience, or if the facts stated by a witness demonstrate the falsity of the testimony, the court is not bound to believe the witness.



In considering claimant's case, this unusual feature stands out prominently, and immediately the question arises why no steps were taken by the claimant to enforce collection of the sum due on the notes during the lifetime of Alva C. Austin. The answer may be that interest would accrue on the amount of the claim and would be an earning power, and by lapse of time would accrue until the interest would be, as it is in the instant case, almost as much as the principal. The fact immediately suggests itself that Kulp, when he transferred the business to Austin for a promissory note of \$75,000, well knew that Austin was not financially able to pay this sum, and also knew from the financial setup of the business that it was a bankrupt concern. Then, again, when the question of bankruptcy was imminent Kulp was anxious to reduce the \$75,000 note to notes aggregating \$35,000, without receiving any payment from Austin to reduce the sum of \$75,000. This clearly indicates that the transaction between Kulp and Austin, was, in the vernacular of the day, for the purpose of unloading a bankrupt business, so that Kulp might avoid the responsibility incurred by him in his operation of the business.

There is evidence tending to establish the fact that the notes signed by Austin were only accommodation notes, that Austin was not to pay them, and that it was never intended by the parties that Austin should assume an obligation by the signing of the promissory notes. It does not seem reasonable from the financial condition of the business that Austin would take over this business and assume an obligation of the proportion of this claim, evidenced by notes.

It is significant that after Austin signed the \$75,000 note on January 12, 1923, a receiver was appointed of a bankrupt business; that in order to relieve Kulp of legal responsibility, Austin negotiated a composition agreement with the creditors of



the bankrupt concern. It is to be remembered that the notes were executed for \$35,000 for this same concern. It does not seem to be within the realm of reason that Austin would sign a note for \$75,000 for a bankrupt concern, and then, upon cancellation of this note, sign notes for \$35,000 for this very same business.

But it may be argued that Kulp released \$40,000 of the \$75,000 of notes in order that Austin might carry on the business. If the business was worth \$75,000 when sold to Austin, then \$40,000 evaporated within a very few months. The evidence in the record clearly explains the reason, which is, if Kulp held a \$75,000 note signed by Austin for this concern, it would tend to cause suspicion among the creditors that the note for this sum might mean that Kulp was still in control, and in order to allay this suspicion Kulp hit upon the scheme that if Austin would sign the notes for \$35,000, it would be in line with the financial setting of the business.

It is clear that Kulp wanted to unload the business upon Austin, who was without financial means. This plan, however, was with the consent of Austin. He was a party to the scheme and, in this transaction, did not stand in any better light than Kulp.

The evidence of Elizabeth Ginsburg is criticized by the claimant as not believable because the witness testified that one of the conversations took place between Kulp and Austin in the London Guarantee Building, 360 North Michigan Avenue, Chicago, when as a fact, Kulp did not occupy space in this building at the time the conversation took place. The fact is, however, that Miss Ginsburg was employed by Kulp and worked for him when his place of business was located on Austin Avenue, as well as when he conducted his business in the building known as the London Guarantee Building, Chicago.

The trial court was in a better position than this court is to pass upon the credibility of the witnesses, Ginsburg and Booth,





whose evidence is also critized by the claimant, and did so when the trial court discussed the evidence offered by the parties in its opinion, and said:

"It is urged that the testimony of Ginsburg and Booth is not compatible with the other evidence in the case, and that it is perjured. It may be here and there in conflict with some matters, such, for example, as the testimony of Ginsburg as to where the chief conversation took place, but the court has considered all the able analysis of counsel for the claimant and has been impelled to the conclusion that neither Miss Ginsburg nor Mr. Booth committed perjury. That is a grave charge and the court has given it great and careful consideration. The court is of the opinion from their appearance, their demeanor, the reasonableness of what they said when taken in conjunction with many matters shown to be true, the apparent and quite obvious sincerity of both witnesses that they both anxiously recognized their oaths and told the truth."

It may be that the witness Ginsburg was confused as to the place where one of the conversations was had, still this does not demonstrate that the statement of the witness was against all human probability, nor does the fact that the witness was confused demonstrate the falsity of the testimony.

It is contended by the claimant that the 70 notes for \$35,000, the contract of August 14, 1923, the five party contract of September 14, 1923, the note for \$75,000 dated January 12, 1923, and the bills of sale dated January 12, 1923, are written instruments and cannot be varied by testimony of prior or contemporaneous parol agreements. The defense was not that the terms of the written instruments could be varied, but rather that the instruments were not based upon sufficient consideration, nor enforceable as against Austin. Evidence of this defense was proper as between the parties to the original transaction, and we are, therefore, of the opinion that the court did not err in receiving the evidence bearing upon that question.



Another point to be considered is that fraud perpetrated against the creditors of Kulp, even if such fraud were proven, does not constitute a defense for Austin. The claim that Kulp's conduct was fraudulent could be availed of only by his creditors, whom he is alleged to have defrauded. The question is not involved in this case, except in so far as it is necessary to show fraud as a motive in disposing of the business; and to carry out the purpose of the fraud, it would be necessary to consider the nature of the transaction as between the parties, and for that purpose only is the evidence properly received. Upon the theory of the case, the court considered that evidence, and as intimated by this court, the evidence was properly received and considered in reaching a final determination of the controversy.

For the reasons stated, we are of the opinion that the record is free of reversible error, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.



36967

HATTIE L. GILES,

Appellee,

v.

MUTUAL BENEFIT HEALTH & ACCIDENT  
ASSOCIATION, a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 L.A. 5974

Opinion filed June 20, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff caused this action to be instituted in the Municipal Court of Chicago against the defendant to recover moneys alleged to be due the plaintiff as the beneficiary under the terms of a health and accident policy issued by the defendant upon the application of David A. Giles, the husband of the plaintiff, during his lifetime. Since making such application David A. Giles has died. The cause was submitted to the court without a jury, which found the issues for the plaintiff and assessed the plaintiff's damages at \$2,000, and entered judgment on such finding. The defendant appeals to this court from the judgment.

The statement of claim filed by the plaintiff alleges that on December 28, 1928, the defendant issued a certain policy of insurance to one David A. Giles, in which the defendant promised that in the event said David A. Giles came to his death through accidental injuries it would pay plaintiff as the designated beneficiary the sum of \$2,000, and after the first year's premiums had been paid, each year's renewal premium paid in advance should increase the death benefit \$200 until the sum total was \$4,000; that while the policy was in full force and effect on December 6, 1931, David A. Giles came to his death from bodily injuries received through accidental means on December 5, 1931; that proper notice and proofs of loss were given and made, and that there is due plaintiff the sum of \$2,600.

Opinion filed June 10, 1932

Defendant by its affidavit of merits, admits the issuance of the policy but denies that death resulted from accidental injuries, and states that the policy was obtained by false and fraudulent representations in the application for the insurance, to the effect that said David A. Giles was a bondsman and a realtor, when in fact he was engaged in gambling and other unlawful enterprises which were the direct cause of his death.

The facts are, substantially, that on December 10, 1928, David A. Giles made written application to the defendant for a policy of accident and health insurance, in which he designated his wife, the plaintiff, as his beneficiary, and stated in his application that he was in the business of bondsman and realtor and that his occupation was such that his duties were confined to securing releases and dealing in general real estate. It appears from the application that he understood and agreed that the falsity of any statement in his application would bar the right to recover, if such false statements were made with intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the association.

This application was forwarded to the home office of the defendant, and under date of December 28, 1928, the defendant issued to Giles its health and accident policy, a provision of which is in part as follows: The defendant -

"does hereby insure David A. Giles \* \* \* against loss of life, limb, sight or time resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means (suicide sane or insane is not covered) \* \* \* subject however to the provisions and limitations hereinafter contained."

The policy contains the further provision:

"Accident indemnities: Part A. specific losses. If the insured shall, through accidental means, sustain bodily injuries as described in the insuring clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the association will pay: For loss of Life: \$2,000.00."

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It was stipulated that all premiums were paid on a quarterly basis; that proper notice and proofs of loss were given; that no question of pleading was presented and that the cause was submitted on three questions, namely,

1. Whether or not the death was due to accidental injuries.
2. Whether or not there was fraud in the procurement of the policy; and
3. The amount, if any, plaintiff is entitled to recover.

On December 5, 1931, Giles left his home about 7:30 P.M. Between 11:30 and 11:45 P. M. that day he went to a garage and asked for a "Hiker", or boy to get into his car and accompany him home and bring the car back to the garage. The "Hiker" got into the car and returned about five or ten minutes later. His wife found him at the front door about midnight that night after he was shot. He was taken to the Providence Hospital where he died at 4:35 A. M. December 6, 1931. After plaintiff had offered evidence and established a prima facie case, the defendant, in support of its defense that the insured made the false statement in his application for insurance that, at the time, he was engaged as a bondsman and a realtor, and that as a matter of fact he was a bootlegger and a gambler, produced evidence of statements alleged to have been made by the insured before and after the date of the application for insurance. Upon this question there is a conflict in the evidence, and unless the evidence of the defendant is sufficient to establish this defense and to overcome the plaintiff's case, this court will not reverse where there is competent and sufficient evidence to sustain the allegations of the statement filed by the plaintiff.

There is evidence in the record offered by the defendant that the insured talked to a witness about the policy game, which is known as a gambling game; also about the purchase of alcoholic



liquors during the prohibition period, but from an examination of the record, it does not appear that the insured was ever seen in a gambling place taking an active part in the game, nor where he is alleged to have been conducting a gambling game known as "policy." The significant fact is that there is no evidence that he was engaged in any other occupation than that stated on the date the application for insurance was filed by the insured. The evidence that defendant contends sustains its defense, is the evidence of one Louis McClanahan, who admitted that he was a professional gambler, and testified that he had a conversation with the insured, Giles, in 1931. Upon objection that the date was too remote, and during the course of the examination of the witness, defendant's counsel made the statement that he did not offer to prove that the witness ever saw the insured sell a policy ticket or run a gambling place, but wished to show by the witness's evidence that Giles talked to the witness and wanted the witness to join him in the venture of running a policy gambling business; that this conversation with the insured was admitted in evidence, and took place in September, 1928, which was prior to the date of December 10, 1928, when the application for insurance was filed by the insured. The same witness also stated that he sold to the insured alcoholic liquors by the case, to be sold by him to customer's and that this took place in May or June, 1928, but none was alleged to have been purchased by Giles after that date. The evidence, however, does not disclose where this liquor was purchased by the insured, or where delivered.

There is also evidence, by Neola Ellis, that in April, 1931, which was several years after the date of the application for insurance, Giles, the insured, came to her home, and told her that he was the owner of the policy game for which she was writing policy tickets. The purpose of this visit by Giles is not clear from the evidence in the record. Another witness testified that he asked



Giles for permission to write policy tickets. Again, this witness failed to give the address of the place where the policy game was conducted, or testify that he visited a gambling place where Giles was present. There was evidence, however, by several witnesses offered by the plaintiff, who testified that the insured was a professional bondsman, and that he was also engaged in the real estate business.

All of this evidence was offered by the parties for the court to weigh and in doing so test the credibility of the several witnesses and apply the rule and consider the interest, as well as the frankness of the several witnesses testifying and their knowledge of the facts and their appearance on the witness-stand, and then determine the weight, not only from the credibility, but also from all the facts and circumstances in evidence, and from an examination of the evidence in the record, we are unable to agree with the defendant that the court erred in entering judgment for the plaintiff against the manifest weight of the evidence.

The defendant in his discussion of the alleged errors in the record, has complained of the conduct of the court. This court has considered the actions of the trial court during the course of the trial, and we are not convinced by the suggestion of the defendant that the record clearly discloses that throughout the trial the trial judge was blind to the undisputed evidence by a prejudice not explained. The suggestion is made that the trial court attempted to intimidate a witness in the case. However, the court did hear the testimony of this witness. Too often witnesses appear and brazenly admit violations of the law, and expect to impress the court with their honesty. Of course when testimony of this kind is before the court, it seems to this court that it would be the duty of the trial court, in a proper case, to take necessary steps to bring an admitted violator to account. It must be remembered



that the court is the trier of the issues, and the conduct of the witnesses is one of the important factors in determining the credibility of their testimony.

The contention of the defendant is that the court erred in finding the issues for the plaintiff by ignoring the alleged undenied and unimpeached evidence of defendant to the effect that David A. Giles was a bootlegger and a gambler at the time of making the application for insurance,. From our inspection of the record we cannot agree with this contention, for, as we have indicated in this opinion, there is a conflict in the evidence regarding the business in which the insured was engaged at that time, and, as we have stated, we are of the opinion that the court did not err in finding the issues for the plaintiff.

There is one further question necessary to discuss, and that is was the death of the insured due to accidental injuries. The evidence is not disputed that his death was caused by a gunshot wound and that he was at the door of his home when he was shot. It is not contended, nor is it charged, that the insured committed suicide, and the evidence is silent regarding the manner in which he was shot. In view of the record, there can be but one conclusion, and that is that death was caused by accidental means.

The suggestion that because the insured was engaged as a bootlegger and a gambler prior to the time the application was filed, does not help us very much in solving the problem. There is no evidence whatever that any threats were made or received by Giles, or any member of his family.

For the reasons indicated, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.





37034

RAYMOND J. DULLARD,

Appellee,

v.

GENEVIEVE DULLARD,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

276 I.A. 598'

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Genevieve Dullard from a decree entered in the Circuit Court of Cook County, Illinois, in a suit for divorce filed by the complainant, (appellee) wherein the complainant charged that the defendant, on or about the 14th day of December, 1930, wilfully deserted the complainant without reasonable cause, and that the desertion continued for more than one year before the filing of the bill of complaint; that two children were born as the result of the marriage, of the age of 12 and 5 years respectively, who are living with the defendant.

The defendant filed an answer in which she admitted the marriage and the birth of the two children living with her, but denied that the desertion took place as charged in the bill, and denied that the complainant ceased to live with the defendant on December 14, 1930, and avowed that the marriage relations between the parties did not cease until October 27, 1931.

The defendant filed a cross-bill praying for a decree of separate maintenance. To this cross-bill the complainant filed his answer, which cross-bill and answer were dismissed on motion of the defendant, without prejudice. After such dismissal, the court entered a decree of divorce, as prayed for in the complainant's bill of complaint.

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GSA FPMR (41 CFR) 101-11.8

MR. J. H. HICKS: I have no further questions to ask.

From the evidence it appears that the complainant returned from war service in France disabled; that he lost the hearing of one ear and the sight of one eye, and is still receiving medical attention; that the complainant was married to the defendant on March 4, 1919, in Chicago, Illinois; that they were subsequently divorced, and thereafter remarried on November 9, 1925; that two children were born of the marriage, one named Raymond J. Dullard, Jr. and the other Vernon Dullard, aged 13 and 7 years, respectively, and were living with their mother.

It also appears from the evidence that the defendant left the complainant on December 14, 1930, and also that the complainant, on December 17, 1930, requested the defendant to return to him; and evidence was also offered by the defendant that after the separation, the complainant cohabited with her on two occasions, which is supported somewhat by the evidence of a witness, who testified that she was present on one of the occasions when the complainant is alleged to have cohabited with his wife, but upon cross-examination, this witness admitted that she had been told about the occurrence. A further witness for the defendant, who was her brother, testified to the alleged cohabitation. This witness, together with another brother, was present at the time the defendant left the complainant, and the record discloses that they arrived at complainant's home one night when intoxicated and opened the door to complainant's apartment with force, and at this time, which was 4:30 o'clock A.M., threats were made by these brothers to injure the complainant. This episode was the result of a party that was attended by the defendant against the complainant's wishes.

It also appears from the record that the complainant made



efforts toward a reconciliation with the defendant, and he received several letters from her, the last bearing date August 4, 1931, in which she refused to return, and said:

"Well Ray the time has come, I have made up my mind fully that we are through \* \* \* Now what I'm writing for mostly is this. Any time you start action on your 'Divorce Suit' will suit me and the sooner the better, \* \* \* Also to do me a big favor start your divorce suit as soon as possible."

The complainant, in rebuttal, denied cohabitation with his wife, after she deserted him, on the occasions testified to by the defendant's witnesses.

The Court after hearing the evidence, indicated that he would not grant a divorce, but sometime thereafter the court changed his views and, at the time he was instructing counsel as to the provisions of the decree, said:

"The Court was disposed on the evidence on first consideration not to give either party the relief prayed, and perhaps the Court was actuated by sympathy; you alluded to the fact the lady had two children, and the Court, too, was affected by your plea in that regard at the time of the hearing, and hesitated to grant a decree of divorce here; but on careful consideration of the evidence the Court thinks there should be a decree of divorce.

Therefore you may prepare your decree."

And upon the preparation of the decree, which the court signed, the court found, in substance, that the complainant was an actual resident of Cook County, Illinois, for over a period of one year before the filing of the bill of complaint; that the parties were lawfully married on the 4th day of March, 1919, and that upon full hearing of the cause, the court found that subsequent to their inter-marriage, the defendant, Genevieve Dullard, willfully deserted and absented herself from the complainant, Raymond J. Dullard without any reasonable cause, for the space of one

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year immediately prior to the filing of the bill of complaint, and the court by its order dissolved the bonds of matrimony existing between the complainant and the defendant, and awarded the care, custody and control of the children to the defendant, until the further order of the court, and ordered that the complainant be granted the right and privilege to visit the children at reasonable times.

Much to our surprise, we find that the following was omitted from the abstract of the record filed by the defendant, Genevieve Dullard: That the decree provides for the payment of \$20.00 per week for the support and maintenance of the minor children, and fixes defendant's solicitor's fees at the sum of \$175, payable in several installments, and finds that there is due the defendant from the complainant under the former orders of the court, the sum of \$600 for alimony, support and maintenance of the children of the parties, and therefore the court entered judgment in the sum of \$600 for the defendant and against the complainant.

The question before this court is largely one of fact, and the law is well settled upon the question of whether the desertion was wilfull and without reasonable cause; and cohabitation, if any, after separation, and the result if any, must be established by the evidence.

The finding of the chancellor is based upon the weight of the evidence, and this is determined by the credibility of the witnesses. The credibility of the witnesses is in turn based upon the appearance of the witnesses, their interest, or lack of interest, and the frankness, propriety or impropriety of their several statements, and the court in applying the rule





above stated, must decide which of the witnesses are worthy of belief. The chancellor, no doubt, considered the several elements necessary to determine the credibility of the witnesses and the weight of their evidence in arriving at a conclusion in this case. One of the important tests is the appearance of the witnesses and their frankness in testifying. This opportunity is not available in this court, and we are not in a position to judge of their frankness and appearance on the stand.

The question to be determined by this court is, whether the facts in the case are against the manifest weight of the evidence. We have examined the record, and, from the evidence, are satisfied that the chancellor was amply sustained by the facts in entering the decree of divorce, and that there is no error in the record. The decree is accordingly affirmed.

DECREE AFFIRMED.

HALL, P. J. AND WILSON, J. CONCUR.

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37043

RALPH E. DeSUNO,

Appellee,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 598<sup>2</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by Ralph E. DeSuno upon what is known as an industrial policy of insurance, issued by the defendant to the insured, Joseph DeSuno, to which a rider was attached entitled "Industrial policy, accidental death benefit," providing as follows:

"upon receipt of due proof that the insured \* \* \* has sustained \* \* \* bodily injuries solely through external, violent and accidental means resulting directly and independently of all other causes in the death of the insured within ninety days from the date of said bodily injuries, while the policy is in force, \* \* \* the company will pay, in addition to any other sums due under this policy \* \* \* an accidental death benefit equal to the face amount of insurance then payable at death \* \* \*."

The defendant paid \$355.50, the face amount of the policy and this suit is for the amount fixed as double indemnity for death caused by accidental means. The insured, Joseph DeSuno, died as the result of a gunshot wound, which it is claimed by the defendant was received by the insured while in the act of committing robbery. The cause was submitted to a jury and judgment was entered on the verdict of the jury for \$350.50 in favor of the plaintiff, from which judgment the defendant appeals.

The question in this case is largely one of fact. It appears from the evidence, substantially, that the insured was shot on August 21, 1931, and, as a result of the gunshot wound, died on September 2, 1931, at the Peoples Hospital located at 255 West Cermak Road, Chicago, Illinois. There is evidence that one Frank Topor was the proprietor of a beer tavern located at 1621 West 43rd Street,

Opinion filed June 26, 1934

Chicago; that he saw Joseph DeSuno on August 21, 1931, at about 11:20 or 11:25 in the forenoon, and on that day Joseph DeSuno and another man entered his place of business with drawn guns and said, "stick-up men" and forced Topor to walk to the back of the store with a gun at his back; that the gunmen took \$100 in cash and \$340 in checks from the witness; that Topor's son shot at the men when they were retreating after the robbery. It also appears from the evidence that Topor further identified the body of the insured as one of the men who appeared at the store at the time stated in this opinion and committed the crime of robbery.

While there is evidence of good character, still the testimony stands uncontradicted that the deceased was one of the men that committed the robbery and was shot at when retreating after the crime was committed; that the insured arrived at the Peoples Hospital and was treated, and while there his clothes were examined and no gun found, but there was found in his clothes \$98.00.

The plaintiff contends that because of the time of the robbery and the distance from the place where the crime was committed to the hospital where the insured was taken for treatment, it would have been a physical impossibility for the insured to commit the crime and arrive at the hospital at about 11:35 A. M. The evidence does not clearly establish the time of the arrival of the insured at the hospital, nor what kind of conveyance was used, and the record is silent as to the place where the insured was wounded and from where he was removed to the hospital. While the plaintiff suggests that the place at which the insured was wounded was 39th Street and Ashland Avenue and that he was shot by persons unknown, this does not appear to be a fact from the evidence.

While as a general rule the court will not reverse a judgment unless it is manifestly against the weight of the evidence, still in order that the plaintiff may recover, he must establish that the



death of the insured must have been caused by accidental means. The question then to be decided is was the death of the insured caused by his being accidentally shot and wounded at a place other than the scene of the robbery by persons unknown. That he was not so shot and wounded at the place where the robbery occurred, does not appear from the evidence.

The plaintiff's position is, of course, that the insured died by accidental means, and he earnestly insists that the insured, who had lived an honorable upright life, was wounded at a place six miles distant from the scene of the robbery, and that he was not shot while in the act of committing a crime. However, plaintiff's position is not sustained by the evidence; but, on the contrary, the judgment entered on the verdict of the jury, upon the theory of the plaintiff, is manifestly against the weight of the evidence as it appears in the record.

The defendant questions the right of the plaintiff to maintain this action, as he was not the administrator of the estate of the deceased. Upon this question the policy provides that the claim may be paid to the executor or administrator, or any person having paid the funeral expenses and other expenses in connection with the death of the deceased, or person related to the deceased. In addition to the provisions of the policy, the defendant, by its officer, wrote the following letter to plaintiff's attorney:

"We acknowledge your letter of July 27, 1932. Please be advised that the cashing of the cheque for the face amount of the policy in no way affects the claimant's right to the payment of double indemnity at a future date. Your client's rights will not be prejudiced in bringing suit to recover a like amount under the accidental indemnity clause in the said policy. We trust this is the information desired.

Yours truly,  
(Signed) Edw. O. Wieters,  
Assistant Secretary."





The fact that the face of the policy was paid to the plaintiff, and this letter of the defendant, would clearly indicate that the plaintiff was not prejudiced in accepting the face amount of the policy. It is apparent not alone from the policy, but also from this letter that the plaintiff was within his rights in instituting action, and the defendant by its letter clearly waived the right to raise the question at this time.

For the reasons indicated in this opinion, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND CAUSE REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.



37058

FANNIE M. TISCH,

Appellant,

v.

FRANKLIN TRUST & SAVINGS BANK, a  
corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

276 I.A. 598<sup>3</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon an appeal from a decree of the Circuit Court approving the report of the Master in Chancery, to whom the cause was referred, and dismissing the complainant's bill of complaint for want of equity.

The bill of complaint seeks to rescind the sale of certain notes secured by a mortgage upon the real estate described and generally known as 6423 Champlain Avenue, in Chicago. The mortgage on this property secured the payment of \$5,000, and a sale of the notes and mortgage was made by the defendant to the complainant on March 17, 1927, and it is charged in the bill of complaint that the defendant made representations to and induced the complainant to purchase the notes and the mortgage set forth in the bill of complaint, and represented that the security for the mortgage indebtedness consisted of a building owned and occupied by white people, whereas, in fact the building was owned and occupied by negroes in a colored neighborhood, and that the improvement upon said mortgaged premises was not a complete and separate three flat building, as represented to the complainant at the time of the purchase of the notes and mortgage.

To this bill the defendant filed an answer, and on February 5, 1932, the cause was referred to William A. Doyle, Master in Chancery of said court, who heard the evidence offered by the parties in interest, and at the conclusion of the hearing filed his

1. The first of these is the fact that the company has been operating for a number of years and has a long and successful record.

Opinion filed June 20, 1934

The second of these is the fact that the company has a large and growing business and is in a position to expand its operations. The third is the fact that the company has a strong financial position and is able to meet its obligations. The fourth is the fact that the company has a good reputation and is well known in its field. The fifth is the fact that the company has a large and loyal customer base. The sixth is the fact that the company has a strong management team. The seventh is the fact that the company has a good location. The eighth is the fact that the company has a good product. The ninth is the fact that the company has a good service. The tenth is the fact that the company has a good price. The eleventh is the fact that the company has a good quality. The twelfth is the fact that the company has a good quantity. The thirteenth is the fact that the company has a good variety. The fourteenth is the fact that the company has a good selection. 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report recommending that the complainant's bill of complaint be dismissed for want of equity. Thereupon, the complainant filed objections to the master's report, which were overruled, and upon the filing of the report in court, an order was entered that the objections filed before the master stand as exceptions to the master's report. After due consideration had been given to the exceptions filed, the court overruled complainant's exceptions and entered the decree which is here on appeal.

The facts are, substantially, that the complainant was a widow, whose husband died in 1922, leaving her a small amount of money. Desiring to invest her money, she was referred by her brother to Irvin J. Rich, secretary of the defendant bank and in charge of its investment department. The complainant talked with Rich at the time, and said that while she wished income, she was more interested <sup>in</sup> the safety of her principal; and that she desired individual mortgages, which she had been told were safer than real estate bonds; that the complainant acquainted Rich with her circumstances, and told him that she knew nothing concerning mortgages or real estate, and that she relied upon him for guidance.

During the course of about five years, that is from 1922, to the time of the purchase of the notes and the mortgage in question, in 1927, the complainant purchased a number of mortgages through Rich, the representative of the bank. Her acquaintance with Rich was both business and social. The complainant made no examination of the premises when she purchased mortgages, but relied upon Rich's recommendations, except on two occasions, when she questioned his recommendation of the purchase of a mortgage upon property occupied by colored tenants, and advised him that she wished to purchase notes and mortgages on "white property" only.

Each of the securities purchased by the complainant was



delivered to her in a wallet or wrapper of the defendant bank, upon which was the following printed matter:

"This security has been protected by every safeguard known to the science of investment banking. Before being offered, it has been subjected to thorough investigation and then purchased outright with our own funds as an investment for this bank.

The service we offer with this investment does not end in the sale of the loan, but continues throughout the life of the security.

We collect and remit principal and interest, look after the insurance, and see that the taxes are paid each year, all without cost to the investor."

These statements the complainant read and believed. In March, 1927, the complainant advised Rich that she would have some money to invest, and thereafter Rich tendered to the complainant the notes and mortgage in question on property commonly referred to as the "Morris mortgage," and there is evidence that he told her he had investigated the security and that it was a sound investment; that the property was "white property" in a white neighborhood, at Sixty-fourth Street and Champlain Avenue, Chicago. In March, 1927, when the complainant bought the Morris mortgage, she was familiar with the field of investment and interest rates, which appears from the following statement;

"I am in the insurance business and we get sort of an inside slant on those things."

The complainant lived on the South Side practically all her life. From the evidence it appears that she attended the South Division High School at 26th Street and Cottage Grove; then the Chicago Normal School at 67th and Normal, traveling back and forth from her home at 35th and Calumet, and in her work as an insurance agent from 1922 to 1927, she solicited business principally on the South Side.

It is also part of the evidence that when the complainant first came to the defendant bank at 25th Street and Michigan Avenue in 1922, she knew that it was a neighborhood of colored people and that the first mortgage she bought from the bank was a \$4,000 mortgage on property at 38th Street and Wabash Avenue; that while she knew





this property was in a colored neighborhood and questioned its desirability on this ground, she finally decided that the rents of the property made it a good security for the amount of the investment, and then it appears from the evidence that four years later, in January, 1926, the complainant purchased from the defendant what is known as the Kornbleth mortgage, secured by property on 32nd street, also in a neighborhood inhabited by colored people. This mortgage was later exchanged for the Rosen and Kritzer mortgage, which was secured by property at 32nd and State Streets. On April 20, 1927, a month after complainant acquired the mortgage now in controversy, she purchased a 7% mortgage in the sum of \$3500 on property at 3829 South Wabash avenue, a renewal of one of the mortgages in the neighborhood inhabited by colored people.

On November 30, 1926, the defendant made a series of five mortgage loans to Floyd L. Morris, each of \$5,000 at 7% per annum and secured by one of five connected three-flat buildings at 6419 to 6427 Champlain avenue. The property was examined by Louis Eisendrath, vice-president of the bank, Edgar Olson, cashier, and Irvin J. Rich, then in charge of the real estate mortgage department of the bank.

Morris purchased the five three-flat buildings for a total sum of \$72,000. In addition to the five \$5,000 first mortgages, he borrowed \$36,000 on a second mortgage covering the same property.

Irvin J. Rich testified that in his opinion the fair and reasonable market value of the property by which complainant's mortgage was secured, when he examined the property in November, 1926, was not less than \$11,000.

One of the five Morris mortgages was purchased by Edgar Olson, cashier of the bank, for his own investment. One, secured by the property adjoining that covered by complainant's mortgage, Rich sold to his mother at par, and the two remaining mortgages of the series were sold to other customers of the bank.



There is also evidence in the record by a witness who was engaged in the real estate business and knew the value of property located as this property was, that the fair and reasonable market value of the property in March 1927, was \$11,880.

The real estate encumbered by the mortgage and notes in question was located in a colored neighborhood, and was owned and occupied by colored people. The improvement on the property consisted of a three-flat section of a building which contained fifteen flats. The building was thirty-two years old, and there was a single heating plant for the entire fifteen apartments, and this heating plant was located in the basement of the three flat section covered by the mortgage in suit. The heating plant was approximately fifteen feet in diameter, and occupied a substantial portion of the basement. There was but a single entrance serving two of the three flat sections, or six flats in all. Three of the flats were covered by the mortgage in question, and the others were upon an adjoining lot. The stairway was four feet in width, resting one-half upon the premises covered by the Morris mortgage, and the other half on the adjoining premises.

From the statements of Rich, as a witness, it appears that he told complainant the building in question was a three-story building, and denied that he misrepresented the character of the building, or its location, or misrepresented the notes and mortgage secured by the property. The rate of interest payable upon this loan was 7% per annum, and no doubt was the inducement for the purchase of the notes by the complainant, as this rate of interest was higher than the rate paid upon real estate otherwise situated.

The complainant contends that as a result of the course of dealings between the parties and the defendant's status as a bank conducting an investment department, the defendant owed a fiduciary



duty to the complainant, requiring the defendant to make a full and adequate disclosure of the character of the mortgage. Because of the relationship, the complainant was justified in assuming that the bank exercised care and ability in the selection of the mortgage, and the complainant was not bound to make any individual inspection or investigation.

The important question in this case is, whether there was a fiduciary relationship in existence between the complainant and the defendant at the time of the transaction relating to the notes and mortgage. The accepted rule upon questions of this kind is that when a confidential or fiduciary relation exists between the parties, a court of equity will scrutinize any transaction between them whereby the dominant party secures any profit or advantage at the expense of the other. Mors v. Peterson, 261 Ill. 532,. Such being the rule, the facts are necessarily controlling upon that question. The relation between the complainant and the defendant was that of a depositor in defendant's bank. The business in so far as the present case is concerned, was the purchase by the complainant from the defendant of notes secured by a mortgage upon real estate in Chicago, in which it is claimed that certain representations were made by Irvin J. Rich, secretary of the defendant bank, Upon the question as to the character of the loan and the value of the mortgaged property, the evidence is in conflict. This question of fact, of course, must be determined by the chancellor.

There is still one more fact to be considered, and that is, was the complainant lured into a sense of security when she stated to Rich that she was not familiar with real estate, and was dependent upon his recommendations for investments with the bank, as to the nature of the security and the value of the property. This, too, was a question of fact for the chancellor. In order



to justify a court of equity in rescinding a contract of sale, in a case of this character, the Supreme Court, in the case of Tuck v. Downing, 76 Ill. 71, announced a rule of law by which the court will be guided in determining the questions necessarily involved. The court said:

"We are familiar with the fact that there is a large class of cases in which courts of equity will grant relief where there has been a misrepresentation, or, as it is called, suggestio falsi. To justify such interposition, it is not only necessary to establish the fact of misrepresentation by clear proof, but it must be about a material matter, or one important to the interests of the party complaining; for, if it was of an immaterial thing, or if the other party did not trust to it, or if it was a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, there is no reason for equity to interfere to grant relief on the ground of fraud. 1 Story Eq. Jur. sec. 191. The misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Thus, a false opinion, expressed intentionally, of the value of the property offered for sale, where there is no special confidence or relation, or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale. *Ib.* sec. 197.

Again, it is said, nor is it every wilful misrepresentation of a fact which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort. *Ib.* sec. 199. This is illustrated by a case at law, Vernon v. Keys, 12 East, 637, where a party upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was there held, by Lord Ellenborough, that no action at law would lie for a deceitful representation of this sort."

The rule applicable in determining the question as to whether or not a fiduciary relation existed, is well expressed in the case of Bishop v. Hilliard, 227 Ill. 382, where the court said:

"A fiduciary relation which brings the parties within the rule contended for by counsel for the appellant is one growing out of the relation of administrator and heir, guardian and ward, attorney and client, principal and agent, - in other

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words, where the business of one is entrusted to another in such a way as to render the principal liable to be imposed upon by the agent. It is sometimes defined to be 'that relation existing between parties where one holds the character of a trustee or a character analogous thereto, such as an agent, guardian and the like, and the person stands in such a position that he has rights and powers which he is bound to exercise for the benefit of the other person.' (13 Am. & Eng. Ency. of Law, - 2d ed. - 10.) Even though a fiduciary relation might exist, transactions between the parties are deemed to be valid if it is made to appear that they were entered into with full knowledge of their nature and effect, and they were the result of deliberate, voluntary and intelligent desire of the parties, and were not consummated by the exercise of the influence engendered as the result of the relation existing between the parties. (Kellogg v. Peddicord, 181 Ill. 22.)"

The complainant was an intelligent woman and active in her line of business - that of an insurance solicitor, and in the transaction of her business, which was largely on the South Side of Chicago, she became acquainted with the district. On two occasions she did not approve of the loan suggested by the defendant, which would indicate that she exercised discretion in determining the advisability of purchasing the paper.

In this case, the complainant did not examine the property, and there is not a scintilla of evidence that the defendant prevented the complainant from doing so if she desired. The complainant did not question the security from the date of the purchase of the notes and mortgage from the defendant until there was a default in the payment of matured interest due November, 1930, and then she did not investigate the building in question, which was a part of the security, and as a witness she said, "I did not examine the property at this time, or at any time since I purchased it." It is admitted that the principal note aggregating the sum of \$5,000 was reduced to \$4,500 by the payment of \$500 by the maker to the complainant after she purchased the notes. We are all familiar with the slump in values during the depression period following 1929, not only in stocks and bonds, but also in real estate values, and this slump occurred after the complainant purchased the notes securing the mortgage in question, and, of



course, is not chargeable to the defendant.

There is an element of fraud in the charge of misrepresentation, and we must be guided by the laws established upon that question, and the rule, which is approved by the Supreme Court in the case of McKenna v. Mickelberry, 242 Ill. 117, is as follows:

"It has been repeatedly laid down by this and other courts that fraud will not be presumed, but must be proved, like any other fact, by clear and convincing evidence. (Union Nat. Bank v. State Nat. Bank, 168 Ill. 256, and authorities cited.) Something more than mere suspicion is required to prove allegations of fraud. The evidence must be clear and cogent and must leave the mind well satisfied that the allegations are true. (Shinn v. Shinn, 91 Ill. 477.) If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source equally as to a corrupt one, the former explanation ought to be preferred. (McConnell v. Wilcox, 1 Scam. 344.) Fraud is never presumed when transactions may be fairly reconciled with honesty, and if the weight of the evidence is in favor of an honest motive that conclusion should always be adopted. (Mey v. Gulliman, 105 Ill. 272; Bowden v. Bowden, 75 id. 143; see, also, Sawyer v. Nelson, 160 Ill. 629; Brady v. Cole, 164 id. 116.) The most that can be said, in our judgment, in favor of plaintiffs in error's charge of collusion and fraud on the part of defendants in error is, that there are some few facts which, if taken alone, might arouse suspicion, but they do not justify the conclusion contended for."

The facts upon the material questions in the instant case are in conflict, and we are of the opinion that the evidence sustains the decree entered by the court.

It is also contended by the complainant as a ground for rescission, that the notes were secured by a mortgage upon a portion of a building instead of a complete building. The evidence by the complainant as to the building is, in part, that the defendant "assured me it was a three-flat building." The testimony of Rich for the defendant is to the effect that he "told her", meaning the complainant, "it was a three-story building." The report of the master was "that the building on said premises consists of three flats constructed as a part of a fifteen flat building." The complaint is that from the front entrance there is a stairway approaching the upper flats, and one half of the stairway is upon the prem-

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ises owned by the complainant, and the other half is upon the adjoining premises owned by a third party. In other words, the entrance and stairway are in common use by adjoining owners of the premises. No doubt the properties are servient to an easement in the use of hallways and stairways. Fossum v. Stark, 302 Ill. 99.

There is evidence that at the time of the transaction in March, 1927, the property was of the value of not less than \$11,000. The evidence of a real estate expert, a witness for the complainant who examined the property shortly before he testified, was that in March, 1927, the property was worth \$5,150. This conflict in the evidence was passed upon by the chancellor, who also passed upon the facts, in order to determine whether or not the complainant was entitled to rescission, and for the reasons stated in this opinion we find that the chancellor did not err in the entry of the decree appealed from. Therefore, the final decree is affirmed.

DECREE AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.



37114

BESSIE SCHLESSINGER,

Appellee,

v.

BERTHA NEWMAN and FRANK NEWMAN,

Defendants,

On Appeal of SARAH COLITZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 598<sup>4</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from an order entered in the Municipal Court of Chicago adjudging the garnishee, Sarah Colitz, guilty of contempt in failing to comply with the order of the court to turn over certain jewelry to the bailiff of the Municipal Court of Chicago. On November 15, 1932, Bessie Schlessinger recovered a judgment against Bertha Newman and Frank Newman in the Municipal Court of Chicago for the sum of \$967.50. Thereafter a garnishee summons was issued against Sarah Colitz, who after service of summons, filed an answer, from which it appears that she had possession of certain jewelry, which was security for a loan due from Jacob Colitz. Jacob Colitz filed his intervening petition, and on February 6, 1933, the trial court ordered the property that was in possession of the garnishee to be delivered to the bailiff of the Municipal Court of Chicago. On February 8, 1933, the court found the issues against the intervening petitioner and entered a final judgment in the garnishment proceedings against Sarah Colitz, directing her to deliver the property in her possession to the bailiff on a special execution issued against the garnishee. Thereafter, Bessie Schlessinger filed her petition for an order that Sarah Colitz be adjudged guilty of contempt of court for failure to deliver the jewelry in compliance with the court's order. The garnishee filed her sworn answer, wherein she stated that she was not guilty of

Opinion filed June 20, 1934

The following is a summary of the facts and circumstances of the case, as presented by the parties and the evidence. The case involves a dispute over the ownership of certain property, which was acquired by the defendant through a series of transactions. The plaintiff claims that the defendant's acquisition of the property was illegal and that the property should be returned to the plaintiff. The defendant, on the other hand, claims that the property was lawfully acquired and that the plaintiff has no right to it. The court has carefully examined the evidence and the arguments of both parties. It has found that the defendant's acquisition of the property was indeed illegal, and that the plaintiff is entitled to the return of the property. The court has also found that the plaintiff is entitled to certain damages, which will be paid to the plaintiff by the defendant. The court's decision is based on the evidence and the law, and it is final and binding on the parties. The parties are expected to comply with the court's decision and to take the necessary steps to effectuate the same. The court has also ordered that the costs of the litigation be paid by the defendant. The court's decision is a final judgment, and it is not subject to appeal. The parties are expected to abide by the court's decision and to take the necessary steps to effectuate the same. The court has also ordered that the costs of the litigation be paid by the defendant. The court's decision is a final judgment, and it is not subject to appeal. The parties are expected to abide by the court's decision and to take the necessary steps to effectuate the same.



any contempt for failure to comply with the order of the court for the reason that no special execution was ever issued and served upon the garnishee; that the order directing her to turn over the jewelry was void; that she was never physically possessed of the property, and therefore did not interfere with the bailiff in executing the special execution in order to sell the jewelry, and that the garnishment act contemplates the existence of an execution in the hands of an officer, which was not complied with.

The garnishee testified that she never had physical possession of the jewelry, but that the jewelry was deposited in a safety deposit box of her son, Jacob Colitz who refuses to deliver up the jewelry.

From the record it appears that the garnishee summons was issued on the 17th day of November, 1932; that judgment was entered in the Municipal Court of Chicago, in the case of Bertha Newman and Frank Newman for use of Bessie Schlessinger, plaintiff, against Sarah Colitz, garnishee. The court after a hearing upon the petition to show cause and the answer of the garnishee, entered, on July 6, 1933, the following order:

"The court finds that it has jurisdiction of the parties and the subject matter; that on February 8, 1933, it ordered the garnishee to deliver certain property to the Bailiff on its special execution issued against the garnishee; that the garnishee refused to deliver the property to the Bailiff on its special execution heretofore served upon her, that no sufficient cause was shown why the property was not delivered; that the garnishee willfully fails and refuses to obey the orders of the court, though well able to do so and she is guilty of willful contempt. It is therefore ordered that the garnishee pay a fine of \$100.00 and the cost of this proceeding and that she be committed to the common jail of Cook County, Illinois, there to remain for a period of ten (10) days charged with said contempt of this court, or until she deliver or cause to be delivered to the Bailiff of the Municipal Court of Chicago the property described, or until released by due process of law."

The garnishee contends that it does not appear from the record that there was an execution in the hands of any officer at the time of the entry of the order to turn over the property to the



officer of the court, but does admit that concurrent with the entry of the order, the court directed that an execution be issued against the garnishee for the levy upon the property described, and for a sale of the property by the bailiff.

The form rather than the substance seems to be questioned in this proceeding. The execution was issued on March 17, 1933, and provides, substantially, after describing the judgment entered, that upon the order entered, the garnishee is to deliver the above described jewelry to the bailiff of the court, which seems to comply with Section 20 of the Garnishment Act, (Cahill's Ill. Rev. Stats. 1933, Ch. 62, Par. 20). This section provides:

"When any garnishee has any goods, chattels, choses in action, or effects other than money, belonging to the defendant, or which he is bound to deliver to him, he shall deliver the same, or so much thereof as may be necessary, to the officer who shall hold the execution in favor of the plaintiff, in the attachment suit or judgment, which shall be sold by the officer, and the proceeds applied and accounted for in the same manner as other goods and chattels taken on execution."

It also appears from the provisions of the Garnishment Act that Section 24 provides that where the garnishee has under his control property which he is bound to deliver to the defendant, the court may make "any and all proper orders in regard to the delivery thereof to the proper officer, and the sale or disposition of the same."

The garnishee cites as authority in this matter the case of Myres v. Frankenthal, 55 Ill. App. 390, but from an examination of this opinion, it does not aid this court upon the question raised by the garnishee, for the reason that it does not appear that a judgment was rendered in the original or the garnishment proceedings in that case, while in the case before us there is no question that judgment was entered in the original proceeding and also in the garnishment proceeding.

The garnishee contends that she was not physically possessed of the jewelry, and therefore was not in contempt of the order of



court. We quite agree with the garnishee's contention that under the Garnishment Act the court is without jurisdiction to compel a garnishee to turn over property not in possession of the garnishee. This is self-evident, but it is quite different if the garnishee tries to evade compliance with the order of the court by concealment of the property. That, of course, was a question of fact for the court to determine.

In the first place, the garnishee by her answer admitted having possession of the jewelry, and after the order was entered for delivery of the jewelry to the bailiff to satisfy an execution in his hands, the garnishee tried to avoid turning over the jewelry in question because she placed it in a safety box, the key to which she said was lost. This box was evidently in joint control of herself and her son, and when she requested her son to deliver the jewelry to her he refused to do so. The question of fact was before the court, the witnesses were heard, and no doubt the court, in order to determine this question, passed upon the credibility of the witnesses that appeared before him, and from the facts as they appear, we are unable upon this question to find that the court erred in finding that the garnishee, Sarah Colitz, refused to comply and stands in defiance of the order entered by the court, and therefore is guilty of contempt.

The garnishee contends that by her answer, as well as by her testimony, she purged herself of any contempt of court. It is clear from the record that the garnishee had the jewelry in her possession; that after the order was entered by the court directing that she deliver the jewelry to the bailiff of the Municipal Court of Chicago, she testified for the first time that she gave the jewelry in question to her son Jacob Colitz to deposit in a box in a safety deposit vault; that the same Jacob Colitz filed an intervening petition for a lien on the jewelry, which was denied by the court, and her son, according to her testimony, refused to deliver the jewelry to her.



Taking these facts as the basis of garnishee's contention that by the filing of her sworn answer she is entitled to discharge, we would be obliged not only to dismiss her admission that she held the jewelry to secure an alleged loan to her son, who by order of court is not entitled to a lien on the jewelry, but we would also have to disregard her defiance of an order to deliver the jewelry to an officer. And further, in a proceeding of this character, which is in the nature of a civil contempt, the defendant garnishee does not purge herself by her answer alone. The court was justified in hearing, and did hear, evidence material to the issues involved, and it was proper, from the facts to enter an order imposing a fine and imprisonment upon the garnishee for failure to comply with the order.

Upon this question the Supreme Court considered whether punishment by fine and imprisonment may be imposed for failure of the person charged with the contempt to comply with an order of court to deliver the property to the person entitled thereto.

In the case of Knott v. The People, 83 Ill. 532, the court said:

" \* \* \* and it then and there appearing to the court that neither of the defendants had complied with the order of the court, by restoring the property to the plaintiff, Love, the court thereupon caused the defendants to be arraigned at the bar of the court; and they having failed to show any cause why they had not complied with the order of the court in the premises, it was thereupon ordered that the defendants, Fogarty and Knott, be committed to the county jail for the period of twenty days, and that each pay a fine of ten dollars and the costs of the proceedings, and that they stand committed until the fine and costs were paid. To this order, Knott excepted, and prayed an appeal to this court, which was granted.

The affidavits filed on the 20th were not in order, for appellant had entered into a recognizance to appear on that day to hear and abide the judgment of the court in the premises, the proofs having been taken and closed. Appellant then stood before the court as in contempt of an order which the court had a right to enter. The proofs satisfactorily show, while the action of replevin was pending, appellant, in defiance of that fact, and in contempt of the law, took the property out of the possession of the replevisor, and placed the same beyond the reach of the law, proceedings then pending





in which his right so to do was involved, the result of which he, as a law abiding citizen, should have patiently awaited.

We do not see, under the circumstances, that the judgment of the court was improper, or more severe than the nature of the case demanded. The citizen must respect the law, and obey the lawful mandates of a court having competent jurisdiction of the subject, otherwise anarchy and lawlessness will prevail to such an extent, if not checked, as to destroy all government."

The garnishee questions the construction of the Garnishment Act, in so far as it relates to the turning over of property to the officer of the court, as being vague, indefinite, incomplete and not enforceable. The appeal in this case is from an order for contempt, and not from an order to deliver the property to the bailiff. This order to deliver the property cannot be attacked collaterally for irregularities in the proceeding, unless the order to deliver is void. In the instant case the court had jurisdiction of the person, as well as of the subject matter at the time the order was entered. Utilities Com. v. City of DeKalb, 283 Ill. 443. In the case of Clark v. Burke, 163 Ill. 334, which has a bearing on the question before this court, the court said:

"It is contended, however, that the assignee was not bound to obey the order directing him to pay the claims in question because that order was not authorized by the allegations in the petition, etc., and because the order went beyond the scope and prayer of the petition. It is well settled that in a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrantly it may appear to be so. (Leopold v. People, 140 Ill. 552, and cases there cited; People v. Weigley, 155 id. 491.) This results from the well settled rule that judgments of courts cannot be attached collaterally for mere irregularities in the proceeding, however erroneous they may be. In this case, exemption from obedience to the order is not claimed because of inability to comply with it arising from anything that has occurred since the order was made, but wholly upon the ground that the court erroneously entered that order. To sustain that defense would amount to no less than allowing the party to be the judge in his own case. In all such cases the remedy of the complaining party is by appeal or writ of error, and not by attempting to stand in defiance thereof."

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Figure 1 is a schematic representation of the experimental design. It shows a sequence of three events: 'Stimulus', 'Response', and 'Feedback'. Each event is represented by a box containing a face. Arrows indicate the flow from Stimulus to Response, and from Response to Feedback. Below the 'Response' box, there is a small box labeled 'Response' with a button icon. Below the 'Feedback' box, there is a small box labeled 'Feedback' with a button icon. The entire sequence is enclosed in a larger box labeled 'Experiment'.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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We have considered the material questions raised upon this record and are of the opinion that the court did not err in the entry of the order finding the garnishee guilty of contempt for failure to comply with the order entered by the court.

For the reasons indicated in this opinion, the order is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.



37126

EDWARD A. NELSON, for use of  
F. C. STRUVE,

Appellee,

v.

NELSON, HUNT & COMPANY, a corp.,  
Garnishee,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 598<sup>5</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the Municipal Court of Chicago against the garnishee in a garnishment proceeding in the sum of \$162.56, from which judgment the garnishee appeals to this court.

This action was instituted by the plaintiff as a judgment creditor against Edward A. Nelson, the judgment debtor, to reach the assets in the hands of Nelson, Hunt & Company. It appears from the evidence that prior to the service of the garnishment summons on Nelson, Hunt & Company, Edward A. Nelson, the judgment debtor was indebted to this company in the sum of \$675. After the service of the garnishment summons, but before the garnishee, Nelson, Hunt & Company, filed its answer of no funds due Nelson, a check was drawn to the order of Edward A. Nelson, an officer of this Company, for the sum of \$162.56, and signed and countersigned by the proper officers of the garnishee company. There is also evidence that the check was not delivered to Edward A. Nelson, but that the sum of \$162.56 was credited on the indebtedness of Nelson in the sum of \$675, due the Company.

It also appears from the amended petition filed by Edward A. Nelson in the garnishment proceeding, that he had an equitable interest in two parcels of real estate located in Chicago, and attached to the amended petition were letters of title from the Chicago Title & Trust Company and an affidavit of one of the record holders of title, Mills R. Smith, stating that he held title to one

Garnishes

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Opinion filed June 30, 1997

of the pieces of real estate for the benefit of Ralph H. Martin and Edward A. Nelson. The trial court, upon the hearing, overruled the motion of Edward A. Nelson to quash the garnishee proceedings and entered judgment against the garnishee Nelson, Hunt & Company for the sum of \$162.56 mentioned above.

The contention is that Nelson was indebted to Nelson, Hunt & Company, and that the Company applied the sum of \$162.56 due Edward A. Nelson to reduce an indebtedness due from him to the Company. The fact that the check was drawn in favor of Nelson but not delivered or paid to him does not prevent the Company from applying the funds as above stated.

A garnishment proceeding is the creature of statute and in order to consider the question of the garnishee it will be necessary to have in mind the provisions of the statute. In garnishment proceedings the garnishee creditor may apply the sum due the defendant in part payment of the monies due the garnishee. Sec. 13 of Chap. 62, Cahill's Rev. Ill. Stats. 1931, provides as follows:

"Every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands all demands against the plaintiff, and all demands against the defendant, of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and whether by way of set-off on a trial, or by the set-off of judgments or executions between himself and the plaintiff and defendant severally, and he shall be liable for the balance only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries: Provided, that the verdict or finding, as well as the record of the judgment, shall show in all cases, against which party, and the amount thereof, any set-off shall be allowed, if any such shall be allowed."

The real question in this case seems to be was the defendant garnishee after the service of garnishee summons, permitted to credit the judgment debtor with the amount of \$162.56 that was due to Nelson at the time. In the discussion of the question, it appears from the statute that the garnishee may retain the amount





in its possession of which it could have availed itself if the garnishee had not been summoned as garnishee, and it further appears from the statutory provisions that the garnishee could by way of set off, on trial, avail itself of this right in a suit to recover the amount due to it. The legislature in passing this provision, no doubt, had in mind that an injustice would follow if a garnishee should be obliged to pay the amount in his hands to a judgment creditor due from the judgment debtor, notwithstanding that the judgment debtor was indebted to the garnishee, and, therefore, provided that the garnishee may under the provisions of the statute credit any monies that the garnishee may have to apply on account of payment of the debt of the debtor to the garnishee. This is what the garnishee did in this case. The only question still to be determined is could the garnishee credit the debtor's account after the service of summons. The garnishee has a right to avail himself of all such demands and set-offs against the judgment creditor as the garnishee would have against the judgment debtor, and shall only be liable for any balance that may remain. As stated in the opinion of the court in the case of Bank of Commerce v. Franklin, 90 Ill. App. 91, this is the rule that applies -

"But the law is settled in this State, that in garnishment proceedings of this character the creditor can only recover of the person garnisheed, when the judgment debtor in whose name the suit is instituted can recover. Supreme Sitting Order of the Iron Hall v. Grigsby, 178 Ill. 57 (62); Finch v. Alexander Co. Nat. Bk., 65 Ill. App. 337; Pullman v. Ry. Eq. Co., 73 Ill. App. 313. The statute provides (Rev. Stat. Chap. 62, Sec. 13) that every garnishee can avail himself of all demands, which could have availed him if he had not been summoned as garnishee, and that he shall be liable only for such balance as may remain, 'after all mutual demands between himself and plaintiff and defendant are adjusted.'"

In the garnishment act above quoted the legislature has used the words, "whether the same are at the time due or not." This phrase was obviously intended to have some meaning, and it cannot be disregarded or treated as a nullity. It is clear and unambiguous. It



states definitely and clearly that the garnishee shall be allowed to deduct out of the property in his hands all demands which he may have against the defendant, whether the same are at the time due or not. This conclusion so far as it is material upon the question before us, was approved in Obergfell v. Booth, 218 Ill. App. 492, and Paisley v. The Park Fireproof Storage Co., 222 Ill. App. 96.

The final question contended for by the garnishee is that the amended petition of the judgment debtor discloses defendant's interest in real estate within the jurisdiction of the court, and for that reason the garnishment proceedings should have been quashed. The question is not material for in this opinion the garnishee is permitted to adjust the account between the garnishee and the judgment debtor notwithstanding the garnishment proceedings. Therefore the amount due the defendant may be applied by the garnishee as part payment of the loan made to Nelson. The plaintiff in this case severely criticized the garnishee because of the torn and mutilated condition of Nelson's check when it was produced in court, and it contends that the trial court was justified because of these suspicious circumstances in the entry of the judgment. It was not necessary to issue a check to justify the credit allowed the defendant on his loan account, and while the check has been mutilated by tearing the signatures from the bottom of the check and cutting away part of the check from the left-hand corner, which the plaintiff contends was for the purpose of destroying possible endorsement by the judgment creditor, still it is clear that this check was not cashed by the bank on which it was drawn, so far as appears from the face of the document.

For the reasons indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

• Behälter und O-Ring

DATE: 01/10/2011 TIME: 12:00

37135

LOUIS PORTMAN,

Appellant,

v.

FRANCES M. LENNEY and MARYLAND CASUALTY  
CO., a Corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 599<sup>1</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a suit brought by the plaintiff in the Municipal Court of Chicago on an appeal bond in the penal sum of \$1,000, executed on August 5, 1931, by Frances M. Lenney, as principal, and the Maryland Casualty Company, a corporation, as surety, defendants.

The amended statement of claim recites and the defendants' affidavit of merits admits the execution of the appeal bond and the dismissal of the appeal pending in the Appellate Court on December 23, 1931, but alleges that by reason of an oral agreement between the plaintiff and the defendant Frances M. Lenney, the pending cause between the parties was not to be prosecuted; that the same was to be dismissed, and in consideration thereof the defendant would pay the several payments agreed upon. Trial was had before the court, without a jury, and upon conclusion of the evidence the court found the issues against the plaintiff as to the defendant Maryland Casualty Company, a corporation, and against defendant Frances M. Lenney in the sum of \$254.63. From this judgment so entered, the plaintiff appeals to this court.

The plaintiff contends that there is but one question for review, and that is did the letter of agreement dated November 28, 1931, entered into between the parties without the knowledge of the Maryland Casualty Company, result in material harm to the Casualty Company and operate as a discharge of its undertaking on the terms of the appeal bond filed in the Appellate Court? The letter referred to is as follows:

Opinion filed June 30, 1934

The following is a summary of the facts and circumstances of the case, as presented by the parties and the evidence. The case involves a dispute over the ownership of certain property, which was acquired by the defendant through a series of transactions. The plaintiff claims that the defendant's acquisition of the property was illegal and that the property should be returned to the plaintiff. The defendant, on the other hand, claims that the property was lawfully acquired and that the plaintiff has no right to it. The court has carefully examined the evidence and the arguments of both parties. It has found that the defendant's acquisition of the property was indeed illegal, and that the plaintiff is entitled to the return of the property. The court has therefore granted the plaintiff's request for a writ of specific performance, which will require the defendant to return the property to the plaintiff. The court has also awarded the plaintiff damages for the loss of the property. The defendant's appeal is dismissed, and the judgment of the lower court is affirmed.

"In consideration of your client's agreement to pay the judgment, interest thereon to date and costs as per schedule listed below entered in the above entitled cause, and to permit the appeal heretofore taken from said judgment to remain in status quo (not to file briefs), I herewith agree, as the attorney for the plaintiff Louis Portman, to accept payment of said judgment, interest and costs in the amounts and on the dates as per schedule listed below, and not to take any affirmative steps for the collection of said judgment either in the Municipal Court of the Appellate Court and not to ask for any additional damages in the Appellate Court, provided that said payments are made upon said dates as per schedule. In the event, however, that the said payments are not made upon the dates as specified, in the schedule, I will proceed as if no agreement had been made. It is understood that time is of the essence of this agreement.

Schedule of Payments

\$200.00 on November 30, 1931  
 \$100.00 on December 7, 1931  
 \$150.00 on January 7, 1932  
 \$163.00 on February 1st, 1932."

The facts in this case are substantially that on November 28, 1931, two days before the briefs of the defendant Frances M. Lenney were due in the Appellate Court, the above letter of agreement was entered into between the parties on behalf of the plaintiff and the defendant Frances M. Lenney, and on November 30, 1931, the lawyers for the plaintiff and the defendant met and \$200 was paid to the plaintiff upon the defendant agreeing to the terms of the letter. Default was made in the payment due on December 7, 1931, and on motion of appellee (plaintiff) Louis Portman, the appeal then pending in the Appellate Court was dismissed on December 23, 1931. No further payments were made to the plaintiff until after the instant suit was filed, and it was agreed in this case by the parties that the principal amount due on the judgment appealed from at the time of the trial of this suit was \$254.63. The original judgment entered by the court was for \$583.11, together with costs and accrued interest, and after the deduction of various amounts paid by the defendant, there was a balance of \$254.63. All these payments were made by the defendant Frances M. Lenney.

It is admitted that the Maryland Casualty Company executed

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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the appeal bond and that it received a premium for such services, so that the company was compensated for its services as surety on the appeal bond, the subject of this suit. It does not appear, however, that there is evidence in the record by the defendant, Maryland Casualty Company, that it has sustained a loss by reason of the letter of agreement herein mentioned. The rule controlling, and by which this court will be guided upon the question pending before us, is that expressed in the opinion of the Supreme Court in the case of Gunsul v. American Surety Co., 308 Ill. 312, in which the court said:

"The weight of modern authority makes a distinction between the rights and liabilities of a voluntary surety or one who becomes a surety for mere accommodation, and the rights and liabilities of corporate sureties who become such for hire. In the case of voluntary sureties for accommodation, if the creditor, by valid and binding agreement, without the consent of the surety gives further time for payment to the principal, the surety is discharged whether actually damnified or not. (Dodgson v. Henderson, 113 Ill. 360; Price v. Dime Savings Bank, 124 id. 317.) Corporations doing a surety business for profit are of comparatively recent origin and their contracts are treated as contracts of indemnity or insurance. As to such sureties it is, we believe, generally held they cannot be relieved from their obligations except where it is shown there was a material departure from the contract which resulted in some injury to the surety. A discussion of this subject, with citation of authorities, will be found in 21 R. C. L., pages 1160 to 1162. (See, also, Royal Indemnity Co. v. Northern Granite and Stone Co. 100 Ohio St. 373, reported in 12 A. L. R. 378, with an extensive note, beginning on page 382.)"

This Company doing a surety business was compensated for the services rendered by its contract as surety upon the appeal bond, which contracts are treated as contracts of indemnity or insurance, and a departure from the contract of the surety company must be a material one and result in injury to the company. The contrary, however, appears so far as injuries were sustained and damages claimed. The judgment in the case wherein the defendant company acted as surety, was reduced from \$583.11, with accrued interest and costs, to the sum of \$254.63, and what was further said by the Supreme Court

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in the case of Gunsul v. American Surety Co., supra, applies to this action, namely,

" \* \* \* if it (the order) be considered as an agreement between the obligee and the principal to extend the time for enforcing the obligation, the plaintiff in error (the surety company) has neither alleged nor proved that it suffered any injury thereby."

In the instant case this court will follow the decision of the Supreme Court in the case of Gunsul v. American Surety Co., supra, and apply the rule of the court above stated.

Upon the facts in the record, the court erred in entering a judgment for the defendant Maryland Casualty Company and against the defendant Frances M. Lenney for \$254.63, and for the reasons stated the judgment appealed from is reversed and judgment will be entered for the plaintiff in the sum of \$1,000, the penal amount of the bond, to be satisfied upon the payment by the defendants of the damages sustained in the sum of \$254.63 and costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

HALL, P.J. AND WILSON, J. CONCUR.

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used.

3. The third part is a discussion of the results obtained.

4. The fourth part is a conclusion and a list of references.

5. The fifth part is a summary of the work done.

6. The sixth part is a list of the names of the authors.

7. The seventh part is a list of the names of the institutions.

8. The eighth part is a list of the names of the sponsors.

9. The ninth part is a list of the names of the reviewers.

10. The tenth part is a list of the names of the printers.

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17. The seventeenth part is a list of the names of the galleries.

18. The eighteenth part is a list of the names of the collectors.

37144

IRMA M. BOHDAN,

Appellee,

v.

NEWBERRY GARAGE, INC., a  
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 599<sup>2</sup>

Opinion filed June 30, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$300 entered in favor of the plaintiff in the Municipal Court of Chicago, in a fourth class action upon a hearing before the court without a jury. In this action plaintiff seeks to recover the value of a fur coat, which coat is alleged to have been delivered on November 23, 1932, to the defendant, together with an automobile, for temporary storage in a public garage operated by the defendant for a certain reward. The fur coat was to be delivered by the defendant, together with said automobile, to the plaintiff upon request, but said coat was not delivered by the defendant to the plaintiff.

While the defendant admits in its affidavit of merits that it operates a public garage for the storage and care of automobiles for hire, it denies that the defendant is engaged in the storage or care of other property, or that it received the fur coat, or had any knowledge of such delivery.

The facts are, substantially, that on the evening of November 23, 1932, the plaintiff, together with another young lady and two gentlemen, motored to the Drake Hotel, in Chicago, in an automobile owned by one of the men in the party, and stopped at the Walton Street entrance of the hotel; that at the time, an

Opinion filed June 20, 1934

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attendant, who was an agent of the defendant, solicited the parking of the car in defendant's garage. Upon this request, the automobile was delivered to the defendant's agent, who handed a claim check to the owner of the automobile, and attached a part of the check to the car. This car was then taken possession of by the agent and servant, and driven to the defendant's garage to be returned to the owner upon request.

There is no dispute in the evidence except as to what was said by the parties regarding the care of plaintiff's fur coat, which was in the car at the time. There is evidence by the plaintiff, corroborated by witnesses, that at the time of the delivery of the automobile to the defendant's agent, attention was called to plaintiff's raccoon coat in the car, and he was asked if the defendant would guarantee that the coat would be all right in the car and returned to the owner; that the agent stated in reply that it would be all right to put the coat in the car. Later, the same evening, the automobile was returned by the defendant, but plaintiff's raccoon coat was missing.

The solicitor and agent of the defendant, as a witness, denied making the statement that the fur coat was guaranteed to be returned in the car, or that it would be in the car when the automobile was returned to the Drake Hotel. The plaintiff's loss was reported to the defendant in its office that night.

The weight of the evidence is for the trial court, and as there is a conflict in the evidence as to what was said at the time of the delivery of the car, the only question to be considered on this appeal is, whether the judgment was entered by the court against the manifest weight of the evidence. From an examination of the record, we are satisfied the evidence is

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sufficient to sustain the judgment entered by the trial court.

The next question is did the court err in overruling the motion of the defendant, made at the close of all the evidence, to find the issues for the defendant?

It is necessary that the defendant have knowledge that the plaintiff's fur coat was in the car at the time it was stored, and having knowledge, the defendant will be charged, as bailee, with possession of the property of the plaintiff in this case.

There is evidence in the record that the agent of the defendant solicited the storage of the car, and it necessarily follows that the defendant will be charged with the acts of its agent, within the scope of the agent's authority. The agent was empowered with authority to receive the automobile, and by the indicia of agency the defendant would be charged with the agent's act within the scope of his employment. The trial court found that the agent of the defendant was notified from the fact that the fur coat was placed in the automobile and was so placed in the car with the agent's consent. The holding out to the public by the defendant that through its agent the defendant was engaged in a public garage service, is sufficient evidence that the agent had an implied authority to charge the defendant with knowledge of the contents of the automobile, and therefore the defendant is held to use reasonable care to protect the property of the plaintiff intrusted to it as a bailee for hire.

In this case, from the evidence of the plaintiff, the bailor, it appears that the defendant failed to deliver the fur coat to her on demand, and as a result she suffered damages by reason of the loss of this coat while in the hands of the defen-



dant. The defendant made out a prima facie case of negligence on the part of the defendant, and the burden is on the latter to show that the loss or injury was not due to any want of ordinary care on its part. Vogelsang v. Fredkyn, 133 Ill. App. 356. To the same effect is the case of Burnstein v. Alcazar Amusement Co. 199 Ill. App. 384.

The case of Hoffman v. Tower Garage Co., General No. 37400, in this court, is somewhat analogous, and was an action to recover the value of a robe which was in an automobile stored with the defendant, who operated a public garage and rendered service for hire. This court held that the garage owner being a bailee for hire, was liable for the value of the robe that was in the car stored by the garage keeper and not returned to the owner on demand.

In the case of Rubin v. Forwarders' Auto Trucking Corp., 181 N.Y.S. 451, wherein the plaintiffs claimed as garage owners, an amount for supplies and car storage furnished the defendant, the owner of an automobile truck, to which claim a counterclaim was filed by the defendant for loss of quicksilver of the value of \$500, which was in the possession of the plaintiff, the court in passing upon the liability for the value of this quicksilver, said:

"The court below dismissed the counterclaim, upon the ground that the placing of the quicksilver in the plaintiffs' office put the risk of its loss upon the defendant.

It seems to us that that was an erroneous view, and that the facts, as to which there was no dispute, show that the plaintiffs did not exercise sufficient care to protect the property of their customer. We do not think it would serve any purpose to decide whether the plaintiffs were, as to the quicksilver, gratuitous bailees, or whether the bailment was coupled with an interest. Regarding the service of storing the quicksilver as a mere gratuity, we are of the opinion that, in view of the nature of the plaintiffs' business, they did not take adequate measures to guard against the very sort of thing that occurred here, and occasioned the loss of which defendant complains." (Citing cases.)

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From the authorities we are of the opinion that the question of notice to the bailee is an important factor, in order that he may be properly charged with the possession of the property intrusted to his care. From the facts as they appear in the record, it is apparent the agent of the defendant had notice that the racoon coat was in the car, and by reason of the implied authority of the agent to accept possession the promise to return it was binding upon the defendant; therefore, the defendant is liable for the value of the plaintiff's fur coat.

Upon the question of damages, there is evidence that the plaintiff sustained damages in the amount of the judgment fixed by the court as being the value of the coat. It is to be noted that the defendant offered no evidence upon this question of value, and we are of the opinion that the damages found to be due and the judgment therefor are not excessive.

The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P. J. AND WILSON, J. CONCUR.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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37153

ILLINOIS ZINC COMPANY, a  
corporation,

Appellee,

v.

UNIVERSAL TOOL & DIE WORKS, a  
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

276 1.A. 599<sup>3</sup>

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court on an appeal by the defendant to review a judgment entered in the Municipal Court of Chicago, for the sum of \$85.60, in favor of the plaintiff. The plaintiff instituted suit in a fourth class contract action, and alleged in the statement of claim that the action was for goods, wares and merchandise sold and delivered to the defendant on or about April 24, 1933, upon an agreed price of \$85.60. Although often requested, the defendant has failed and refused to pay the sum due, or any part thereof. It is further alleged in the statement that the plaintiff's claim is for \$85.60, being an account stated, and the balance was agreed upon between the plaintiff and the defendant on or about May 1, 1933.

The defendant made a motion, after its entry of appearance, for a more specific statement of claim and a copy of the account, together with a motion for a bill of particulars, which motions were denied by the court. The defendant stood by its motion and refused to go to trial, whereupon the trial court heard said cause, in which the defendant took no part, and at the conclusion of the hearing, the court entered a judgment, as hereinabove stated.

Plaintiff did not appear on this appeal, therefore the court is without the plaintiff's views upon the questions now before this court.

The defendant contends that it was not informed by the plaintiff's statement of claim what the goods, wares and merchandise

Opinion filed June 20, 1934



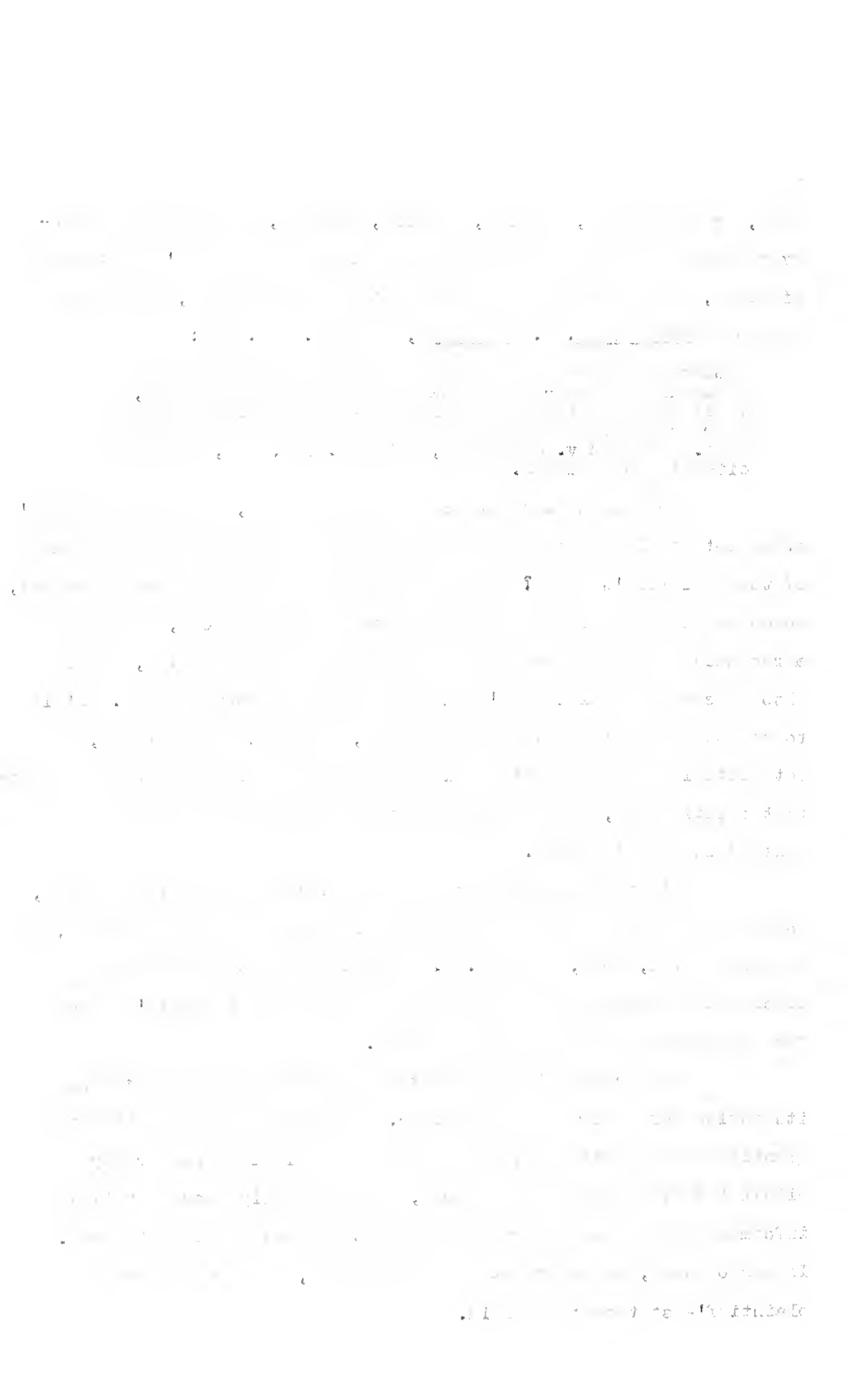
were, or the nature, quality, or kind, thereof, or anything whatsoever beyond the general statement made in the plaintiff's statement of claim, and the defendant in support of its position, cites the case of Siotka et al. v. Rappaport, 234 Ill. App. 576:

"Under the rules of pleading affecting a statement of claim in a fourth-class action in the Municipal Court, it is required that the plaintiff state sufficient facts to reasonably inform the defendant of the nature of the case. McClunn v. Gillespie, 227 Ill. App. 400, and cases cited in the opinion.

The first question to be considered is, was the plaintiff's statement of claim sufficient to apprise the defendant of the nature of the plaintiff's claim? The allegations contained in the statement, which are in the nature of common counts are that goods, wares and merchandise were sold to the defendant for an agreed price, and it also appears that plaintiff's claim is for an account stated. It is to be noted that the price of the goods, wares and merchandise, as set forth in the statement of claim was agreed upon between the parties to the litigation, and was sufficient to charge the defendant as alleged in the statement.

It is also alleged that the account was a stated account, and that the price agreed upon by the plaintiff and the defendant, on or about May 1, 1933, was \$85.60. This is amply sufficient to reasonably inform the defendant of the nature of plaintiff's case the defendant is called upon to defend.

The defendant suggests that the court erred in denying its motion for a bill of particulars. The general rule is that the granting of an order requiring a bill of particulars is largely within the discretion of the court, and especially when a party is informed with reasonable certainty of what he is required to meet. In our opinion, the defendant was so informed, as appears from plaintiff's statement of claim.



The evidence heard before the court was not preserved by a bill of exceptions filed in this case, and we will presume that sufficient evidence was presented to the trial court to warrant judgment for the plaintiff. The judgment entered by the court is, accordingly, affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.



37164

PEOPLE OF THE STATE OF ILLINOIS,  
Ex rel. PHILIP R. CRIPPEN,

(Relator,) Appellee,

APPEAL FROM

v.

CITY OF CHICAGO, EDWARD J. KELLY,  
Mayor, James A. Kearns, City Treasurer,  
M. S. SZYMCAK, City Comptroller, James  
P. Allman, Commissioner of Police,  
Richard J. Collins, President Civil  
Service Commission, Joseph P. Geary,  
Member Civil Service Commission,  
Alfred O. Anderson, Member Civil Service  
Commission, City of Chicago, Illinois,

CIRCUIT COURT

COOK COUNTY.

(Respondents.)

Appellant.

Opinion filed June 20, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from an order directing the respondents by writ of mandamus to restore the relator to duty as Secretary, Department of Police, and to enter his name on the rolls. The proceeding is brought by the relator upon his petition that a writ of mandamus issue directing the respondents to restore the relator as Secretary, Department of Police, and that the Civil Service Commission cancel and expunge from their records an order alleged to have been issued on June 27, 1930, granting authority to the Acting Commissioner of Police, John H. Alcock to discharge the relator.

The respondents filed a general and special demurrer, which demurrer was overruled by the court, and thereupon the respondents elected to stand by said demurrer, and failed to plead or answer, and the court thereupon entered the final order, which is in this court on appeal.

The respondents contend that the relator in asserting in this form of action that he was removed from his office in violation of the Civil Service Law, must assert his right to this office within a reasonable time after such right has accrued. It affirmatively appears from the petition of the relator that he made a written demand on April 13, 1933, upon the respondents, that they cancel and

276 1.A. 599<sup>4</sup>

Appellant ( )

Appellant.  
Opinion filed June 30, 1934

expunge from their records the order dated June 27, 1930, granting authority to the acting Commissioner of Police to discharge the relator as Secretary of the Department of Police, and made a demand that he be restored to this office. Upon failure of the respondents to comply with this demand, the relator instituted a mandamus proceeding on May 5, 1933.

The rule of law applicable to this form of action is that a writ of mandamus is not a writ of right, and it is largely within the sound discretion of the trial court to refuse to issue it. The courts in the exercise of the discretion with which they are vested, may, in view of all the consequences attendant upon the issuance of a writ of mandamus, refuse the writ, though the relator has a clear legal right. People v. Olsen, 315 Ill. 620; Jacobsen v. City of Chicago, 191 Ill. App. 511.

The petition filed in this case does not state any reason for delay by the relator in asserting his alleged right to office. He was discharged on June 28, 1930. Thereafter on June 13, 1933, he made a written demand, and instituted suit on May 5, 1933. This court has held in numerous cases that where a relator is guilty of laches, a delay for a period less than that fixed by the statute of limitations within which an action may be instituted, will bar the relator from recovery. People v. City of Chicago, 148 Ill. App. 96; People v. City of Chicago, 147 Ill. App. 591.

From the petition it appears that an appointment was made after relator's discharge to fill the position of Secretary, Department of Police, and that such appointee is now occupying the position and has apparently been performing and discharging the duties of this position. The suggestion is made, however, that the appointment was made for political reasons.

The petition sets up several rules adopted by the Civil Service Commission, and it also appears that the relator, by reason of the Civil Service rules governing such appointment, was

1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order, and the addresses are given in full. The list is as follows:

Mr. J. H. Smith, 123 Main St., New York, N. Y.  
Mr. J. D. Jones, 456 Elm St., Boston, Mass.  
Mr. W. E. Brown, 789 Oak St., Chicago, Ill.  
Mr. R. L. Green, 101 Pine St., Philadelphia, Pa.  
Mr. S. K. White, 202 Cedar St., St. Louis, Mo.  
Mr. T. M. Black, 303 Maple St., Cincinnati, Ohio.  
Mr. U. N. Gray, 404 Birch St., Portland, Me.  
Mr. V. O. Hall, 505 Spruce St., Seattle, Wash.  
Mr. W. P. King, 606 Fir St., San Francisco, Cal.  
Mr. X. Q. Lee, 707 Willow St., Los Angeles, Cal.  
Mr. Y. R. Scott, 808 Ash St., San Diego, Cal.  
Mr. Z. S. Adams, 909 Hickory St., San Jose, Cal.  
Mr. A. T. Baker, 1010 Walnut St., Sacramento, Cal.  
Mr. B. U. Carter, 1111 Chestnut St., Fresno, Cal.  
Mr. C. V. Davis, 1212 Olive St., Bakersfield, Cal.  
Mr. D. W. Evans, 1313 Elm St., Stockton, Cal.  
Mr. E. X. Foster, 1414 Maple St., Modesto, Cal.  
Mr. F. Y. Gibson, 1515 Birch St., Yuba City, Cal.  
Mr. G. Z. Hall, 1616 Spruce St., Marysville, Cal.  
Mr. H. A. King, 1717 Fir St., Eureka, Cal.  
Mr. I. B. Lee, 1818 Willow St., Ukiah, Cal.  
Mr. J. C. Scott, 1919 Ash St., Redding, Cal.  
Mr. K. D. Adams, 2020 Hickory St., Yreka, Cal.  
Mr. L. E. Baker, 2121 Walnut St., Orland, Cal.  
Mr. M. F. Carter, 2222 Chestnut St., Colusa, Cal.  
Mr. N. G. Davis, 2323 Olive St., Knights Landing, Cal.  
Mr. O. H. Evans, 2424 Elm St., Sutter, Cal.  
Mr. P. I. Foster, 2525 Maple St., Yuba, Cal.  
Mr. Q. J. Gibson, 2626 Birch St., Marysville, Cal.  
Mr. R. K. Hall, 2727 Spruce St., Eureka, Cal.  
Mr. S. L. King, 2828 Fir St., Ukiah, Cal.  
Mr. T. M. Lee, 2929 Willow St., Redding, Cal.  
Mr. U. N. Scott, 3030 Ash St., Yreka, Cal.  
Mr. V. O. Adams, 3131 Hickory St., Orland, Cal.  
Mr. W. P. Baker, 3232 Walnut St., Colusa, Cal.  
Mr. X. Q. Carter, 3333 Chestnut St., Knights Landing, Cal.  
Mr. Y. R. Davis, 3434 Olive St., Sutter, Cal.  
Mr. Z. S. Evans, 3535 Elm St., Yuba, Cal.  
Mr. A. T. Foster, 3636 Maple St., Modesto, Cal.  
Mr. B. U. Gibson, 3737 Birch St., Yuba City, Cal.  
Mr. C. V. Hall, 3838 Spruce St., Marysville, Cal.  
Mr. D. W. King, 3939 Fir St., Eureka, Cal.  
Mr. E. X. Lee, 4040 Willow St., Ukiah, Cal.  
Mr. F. Y. Scott, 4141 Ash St., Redding, Cal.  
Mr. G. Z. Adams, 4242 Hickory St., Yreka, Cal.  
Mr. H. A. Baker, 4343 Walnut St., Orland, Cal.  
Mr. I. B. Carter, 4444 Chestnut St., Colusa, Cal.  
Mr. J. C. Davis, 4545 Olive St., Knights Landing, Cal.  
Mr. K. D. Evans, 4646 Elm St., Sutter, Cal.  
Mr. L. E. Foster, 4747 Maple St., Yuba, Cal.  
Mr. M. F. Gibson, 4848 Birch St., Marysville, Cal.  
Mr. N. G. Hall, 4949 Spruce St., Eureka, Cal.  
Mr. O. H. King, 5050 Fir St., Ukiah, Cal.  
Mr. P. I. Lee, 5151 Willow St., Redding, Cal.  
Mr. Q. J. Scott, 5252 Ash St., Yreka, Cal.  
Mr. R. K. Adams, 5353 Hickory St., Orland, Cal.  
Mr. S. L. Baker, 5454 Walnut St., Colusa, Cal.  
Mr. T. M. Carter, 5555 Chestnut St., Knights Landing, Cal.  
Mr. U. N. Davis, 5656 Olive St., Sutter, Cal.  
Mr. V. O. Evans, 5757 Elm St., Yuba, Cal.  
Mr. W. P. Foster, 5858 Maple St., Modesto, Cal.  
Mr. X. Q. Gibson, 5959 Birch St., Yuba City, Cal.  
Mr. Y. R. Hall, 6060 Spruce St., Marysville, Cal.  
Mr. Z. S. King, 6161 Fir St., Eureka, Cal.  
Mr. A. T. Lee, 6262 Willow St., Ukiah, Cal.  
Mr. B. U. Scott, 6363 Ash St., Redding, Cal.  
Mr. C. V. Adams, 6464 Hickory St., Yreka, Cal.  
Mr. D. W. Baker, 6565 Walnut St., Orland, Cal.  
Mr. E. X. Carter, 6666 Chestnut St., Colusa, Cal.  
Mr. F. Y. Davis, 6767 Olive St., Knights Landing, Cal.  
Mr. G. Z. Evans, 6868 Elm St., Sutter, Cal.  
Mr. H. A. Foster, 6969 Maple St., Yuba, Cal.  
Mr. I. B. Gibson, 7070 Birch St., Marysville, Cal.  
Mr. J. C. Hall, 7171 Spruce St., Eureka, Cal.  
Mr. K. D. King, 7272 Fir St., Ukiah, Cal.  
Mr. L. E. Lee, 7373 Willow St., Redding, Cal.  
Mr. M. F. Scott, 7474 Ash St., Yreka, Cal.  
Mr. N. G. Adams, 7575 Hickory St., Orland, Cal.  
Mr. O. H. Baker, 7676 Walnut St., Colusa, Cal.  
Mr. P. I. Carter, 7777 Chestnut St., Knights Landing, Cal.  
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Mr. R. K. Evans, 7979 Elm St., Yuba, Cal.  
Mr. S. L. Foster, 8080 Maple St., Modesto, Cal.  
Mr. T. M. Gibson, 8181 Birch St., Yuba City, Cal.  
Mr. U. N. Hall, 8282 Spruce St., Marysville, Cal.  
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Mr. G. Z. King, 9494 Fir St., Ukiah, Cal.  
Mr. H. A. Lee, 9595 Willow St., Redding, Cal.  
Mr. I. B. Scott, 9696 Ash St., Yreka, Cal.  
Mr. J. C. Adams, 9797 Hickory St., Orland, Cal.  
Mr. K. D. Baker, 9898 Walnut St., Colusa, Cal.  
Mr. L. E. Carter, 9999 Chestnut St., Knights Landing, Cal.



appointed an Inspector of the Police Department on July 1, 1913, and since that time the relator has remained in the classified civil service of the City of Chicago, and, because of such service and his age, became eligible to a pension on November 7, 1932.

The petitioner, however, questions the authority of any of the officials of the City of Chicago to discharge him from his position as Secretary, Department of Police under the rules and facts as they appear in the petition.

It may be said that the action was filed within the period provided for by the statute of limitations. That fact, however, will not prevent a defense of laches, which is recognized by this court as a proper defense, depending of course like all other defenses upon the facts and circumstances in each particular case. If the City of Chicago by any of its proper officers leads a party to delay the bringing of suit by holding out hopes of adjustment or promises to reinstate the party to his former position, the City of Chicago would be estopped from taking advantage of such delay and from urging that the party is barred by laches. Conductors' Benefit Ass. v. Loomis, 142 Ill. 560. It is apparent from the record that the relator delayed in urging his claim by the institution of the present suit for a period of approximately 2 years and 11 months, and in view of the law which applies and the facts as stated, such laches will bar the relator from the relief prayed for in his petition. Therefore the court erred in granting the peremptory writ of mandamus, and the order is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.



37055

ELI METCOFF,

Plaintiff in Error,

v.

BENJAMIN F. STEIN,

Defendant in Error.

~~ERROR TO~~

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 600<sup>1</sup>

Opinion filed June 20, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action as one of the fourth class in the Municipal Court of Chicago, for value of an interest coupon in the amount of \$350.00, which was held by him uncanceled, on the theory that he had purchased this interest coupon from the defendant with defendant's knowledge and that the defendant had subsequently foreclosed the trust deed of which the interest coupon was a part and had secured and satisfied all defendant's indebtedness and consequently held the \$350.00 for the benefit of the plaintiff. The cause was heard by the court without a jury resulting in a finding in favor of the defendant and judgment on the finding.

From the facts it appears that one Louis Kolber and Jennie Kolber, his wife, executed their certain trust deed, dated August 16, 1926, to secure the execution of a principal note of \$10,000.00, payable in five years and bearing interest at the rate of 7% payable semi-annually. The makers executed their 10 interest notes for \$350.00 each and on or about October 19, 1928, the Chicago Title & Trust Company, as trustee, filed its bill to foreclose. The principal note, interest and costs due amounted to \$10,472.50. Included in the foreclosure proceedings was the interest note of \$350.00, being coupon number 1 - 0, which is the interest coupon involved in this proceeding, and which by the decree was found paid. The foreclosure

1. The first point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability.

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Opinion filed June 20, 1934

The second point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The third point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The fourth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The fifth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The sixth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The seventh point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The eighth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The ninth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability. The tenth point to be considered is the question of the validity of the evidence presented in the report. It is stated that the evidence is of a high standard of accuracy and reliability, and that it is of a high standard of accuracy and reliability.

proceeding was consummated by decree on May 23, 1929, finding there was due to the complainant a total sum of \$12,660.37, and a sale was had under the decree by which Benjamin F. Stein became the purchaser and also obtained a deficiency decree. A receiver was appointed to take care of the premises during the period of redemption for the purpose of collecting the rents to satisfy the deficiency. As a result of the foreclosure proceedings and the receivership, the indebtedness was satisfied except a balance of \$187.47.

The plaintiff in this proceeding held the interest coupon note 1 - 0 at the time of the foreclosure proceeding and was made a party to the proceeding as an unknown owner. It is his claim that the owner of the trust deed was represented at the time of the foreclosure proceeding by the firm of Moses, Kennedy, Stein & Bachrach and that the plaintiff had purchased the note in question through one S. Stein, an attorney of record, and that, consequently, the attorneys for the complainant in the foreclosure suit knew that he, Metcoff, was the owner of said note and that this knowledge of the attorneys was in fact the knowledge of the complainant; that it was the duty of the complainant with this knowledge to have made the plaintiff Metcoff a party to the foreclosure proceeding so that he could be protected in the securing of money due him on this interest coupon note; that not having done so the complainant committed a fraud on this plaintiff and holds the money collected for his benefit.

The defendant contends that the plaintiff is a mere volunteer and paid the interest note when due at the request of Kolber and his wife and that the \$350 paid to secure this note was a loan to Kolber and that the note was turned over to him by the defendant uncanceled for the purpose of protecting his claim against Kolber.

The question for consideration narrows itself down to



this: Did the plaintiff Metcoff purchase the note from the defendant or was he a mere volunteer without any legal obligation who undertook to pay this interest note at the request of and for the benefit of Kolber, the maker of the note and trust deed?

Where one undertakes to pay an obligation of another without being obligated by law, the presumption is that such a person is a mere volunteer and that the payment is intended to extinguish the obligation. The proceeding is generally considered as a loan, to the obligor. In the case of Suppiger v. Garrels, 20 Ill. App. 625, the court said:

"A mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. Hough v. The Aetna Life Ins. Co., 57 Ill. 318; Young v. Morgan, 89 Ill. 203; Beaver v. Slanker, 94 Ill. 175. A stranger within the meaning of this rule is not necessarily one who has had nothing to do with the transaction out of which the debt grew. Any one being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer."

The Supreme Court in the case of Ellis v. Hartmus, 113 Ore. Rep. 157, in its opinion, says:

"3. The appellant was a stranger to the note and mortgage, and was under no obligation to the mortgagee to pay the note or extinguish the mortgage. In such case, to constitute a purchase of the instrument, it must appear that there was a contract to that effect between the stranger and the holder of the paper."

A similar case was before the Supreme Court of Wisconsin and in its opinion in the case of Wyss v. Grunert and others, 108 Wisc. 38, that court laid down the rule as follows:

"The test above indicated plainly precludes disturbing the findings of fact on the subject of whether the note was purchased of or paid to the Citizens' Bank. The direct evidence is clearly in conflict. There are significant circumstances establish that point both ways, some of which, on both sides, are susceptible of reasonable explanation, and some are not. Even if we were to weight the probabilities in order to arrive at a conclusion, it is not clear upon which side the preponderance would be. The strongest circumstances in appellant's favor is the fact that he took the note, accompanying the act with a declaration to having it canceled. That, without corroboration, is not enough to warrant finding that the transaction was a sale. A sale requires a precedent

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1. *Journal of the American Medical Association*, 1990; 263: 1033-1036.



executory contract, one party agreeing to sell and the other to buy. The consummation of the contract requires a transfer of the title of the subject of sale with intent to execute it. Where there is a mere taking up of a note by a stranger, it being delivered uncanceled, by request, without any other circumstances, the presumption of law is that a payment of the note was intended and that the note is thereby extinguished. 2 Edwards, Bills & N. § 728; Lancey v. Clark, 64 N. Y. 209; Binford v. Adams, 104 Ind. 41; Dougherty v. Deeney, 45 Iowa 443; Swope v. Leffingwell, 72 Mo. 348."

In the Wyss case the court held that the question as to whether the plaintiff purchased the note from the defendant or was a mere volunteer, was a question of fact which was settled by the trial court and that there being a clear conflict of evidence from the testimony and the inferences to be drawn from the facts, it would not disturb the judgment.

The plaintiff in the case at bar testified that "he saw Mr. Stein, the lawyer, and told him that Mr. Kolber wanted him, the plaintiff, to take up an interest note and asked how he could be protected and that Stein, the lawyer, told him that he would give him the note not marked paid;" "that he then mailed a check to Stein and received the note in return without its being cancelled. This would indicate that the plaintiff Metooff was taking up the note for the benefit of Kolber and was a volunteer and was receiving the note uncanceled for his own protection. On cross-examination the plaintiff testified that Stein told him, "We will take care and you don't have to worry about it because you are just buying this note." This statement of Stein's standing alone would indicate that the plaintiff had purchased the note. The two statements are in conflict and it becomes necessary to examine the circumstances surrounding the transaction to see whether or not any light can be gathered from them. It is evident that if the interest note was purchased from the defendant it would have to be subsequently paid out of the proceeds of any foreclosure proceeding and the defendant would not receive any benefit from the sale but instead his security would be lessened. As

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The diagram illustrates the experimental setup. A subject is seated at a table, looking at a video screen. A video camera is positioned above the screen. A light source is positioned to the left of the screen. A target is positioned on the screen. The subject's hand is positioned near the target. The diagram shows the relative positions of the subject, camera, screen, light source, and target.

1. The first step is to identify the key components of the system. This includes understanding the hardware, software, and data involved. For example, in a web application, this might involve identifying the server, database, and user interface.

ALL INFORMATION CONTAINED

[illegible]
$$x = \frac{1}{2} \left( \frac{1}{2} + \frac{1}{2} \right) = \frac{1}{2} \quad \text{and} \quad y = \frac{1}{2} \left( \frac{1}{2} + \frac{1}{2} \right) = \frac{1}{2}$$
$$f_1(x) = 3 + \frac{1}{x} = 3 + x^{-1} \Rightarrow f_1'(x) = 0 - x^{-2} = -\frac{1}{x^2}$$

was said in the case of Farmers' Loan & Trust Co. v. Oregon & W. T. R. Co., 67 Fed. 404,

"It was to the interest of the bondholders that the coupons should be paid, not purchased and held for future payment. To sustain the intervener's claim, it must appear that the payment of coupons by him was upon a distinct understanding with the holders of the bonds to which the coupons belonged that such coupons were purchased, not discharged. Otherwise, the accumulation of interest would impair the security of such bondholders, and work a fraud upon them."

From the record it appears that Kolber is insolvent. This fact was charged in the bill of complaint introduced in evidence. This coupon note was due and payable February 16, 1928. The plaintiff testified that he did not know of the foreclosure proceedings until long after the property was sold and the complainant therein had secured the money. This would have been a year or more after he had purchased the note. It is unusual for the holder of a note not to seek payment when it becomes due and the fact that the plaintiff did not do so, but waited a year or more before making inquiry, was a point which the court evidently considered in arriving at its finding as to the intention which governed the plaintiff in making the payment in question. If it was a purchase, the plaintiff would have been more interested in securing payment. If it was a loan intended to pay the note then due, it would not make any difference. The note was payable to bearer and bore no endorsement.

The contention of plaintiff that the defendant committed a fraud upon him by not making him a party to the foreclosure proceeding was also one of fact. Fraud must be clearly shown. The fact that the plaintiff was made a defendant in a foreclosure suit as an unknown owner does not of itself show fraud, particularly if the payment by the plaintiff Metcoff was for the purpose of paying the coupon interest note for and on behalf of the maker Kobler. The decree in the foreclosure suit adjudicated the rights of the parties and this action is, in effect, an attempt to review that decree.

The first part of the book is devoted to a general introduction to the subject of the book. It is divided into two main sections. The first section is devoted to a general introduction to the subject of the book. The second section is devoted to a general introduction to the subject of the book.

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It does not appear from the record that the plaintiff Aetcoff made any effort to ascertain whether any action was being taken to protect his interests as the alleged owner of the note. A person cannot rely entirely upon the action of others to protect his own interests. He is also under a duty to exercise diligence on his own behalf. If this diligence had been exercised he could still have intervened in the original proceeding.

The question was one for the trial court and in view of the presumptions surrounding such a transaction and the facts in evidence and the inferences to be drawn therefrom, we are not disposed to substitute our opinion in place of that of the trial court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.



37188

JACOB ELLEGANT,

Plaintiff in Error,

v.

METROPOLITAN CREDIT & DISCOUNT CORP.,

Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

276 I.A. 600<sup>2</sup>

Opinion filed June 20, 1934

MR. JUSTICE WILSON delivered the opinion of the court.

The complainant, Ellegant, filed his bill for an accounting and an injunction in the Superior Court against the Metropolitan Credit and Discount Corporation, defendant. An amended bill of complaint was later filed in said cause, to which an answer was filed by the defendant. The cause was referred on bill and answer to a master in chancery who recommended that the bill be dismissed for want of equity. Exceptions to the master's report were overruled and the bill dismissed. A temporary injunction had issued at the request of the complainant, based upon the bill, which was dissolved upon notice served upon the complainant. A suggestion of damages was filed by leave of court and upon a hearing such damages were awarded the defendant.

The bill charges that the complainant, Jacob Ellegant, was doing business under the name of the Ellegant Paper Box Manufacturing Company; that he secured a loan from the defendant and executed 12 promissory notes, falling due consecutively, and in order to secure said notes executed a chattel mortgage upon the fixtures and machinery of the factory owned by him in the aggregate sum of \$3,750; charges that there remains due the sum of \$1,350, of which he has made tender to the defendant and the tender has been refused, but that the said defendant demands a further sum of \$750,

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plus interest, which is usurious and that the defendant threatened to seize the goods, chattels and machinery upon the premises if the full amount is not paid; tenders the amount of \$1,350 in open court, which was deposited with the clerk and asks for an accounting and prays that the chattel mortgage be cancelled and released and that an injunction issue restraining the defendants from proceeding under the chattel mortgage.

Upon the hearing before the master in chancery it developed from the evidence that prior to the filing of the bill of complaint, Ellegant had been instrumental in organizing a corporation under the name of Ellegant Paper Box Manufacturing Company; that also prior to the filing of the bill of complaint, he sold and conveyed all the machinery and equipment described in the chattel mortgage to this corporation and at the time of the filing of the bill had no interest in the same other than as one of the stockholders of that corporation. It is apparent that the complainant in charging that he was individually liable to be injured in the event an injunction did not issue as prayed for in the bill of complaint, was in error to say the least, inasmuch as he no longer had any interest in these chattels. Having disposed of his interest he was not entitled to maintain a bill to restrain a foreclosure of the mortgage. The corporation itself is not a party to this litigation and it now appears to the court that the balance has been paid and the chattel mortgage released. This fact is contained in affidavits in support of a motion to dismiss the appeal and is not denied by the complainant. If there had been a deficiency after a foreclosure of the chattel mortgage and the complainant had been sued for the balance, he would have had a right in an action to set up the defense of usury. There was no occasion to anticipate an



action at law by a bill in equity. The bill was properly dismissed and damages properly awarded upon the dissolution of the injunction. Funds remaining in the hands of the clerk of the Superior Court are still subject to disposition by the chancellor of that court.

For the reasons stated in this opinion the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

and the other two, the first of which is the most important, are the two most important factors in the determination of the rate of growth of the economy. The first of these is the rate of growth of the population, and the second is the rate of growth of the capital stock. The rate of growth of the population is determined by the balance of births and deaths, and the rate of growth of the capital stock is determined by the balance of savings and investments. The rate of growth of the economy is determined by the balance of these two factors.

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37201

SHADE R. WARD,

(Plaintiff) Defendant in Error,

v.

GEORGE W. BLOMGREN, Receiver of  
Lincoln Trust & Savings Bank, a  
corporation, and the LINCOLN TRUST  
& SAVINGS BANK, a Corporation,

(Defendants) Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

276 I.A. 600<sup>3</sup>

Opinions filed June 20, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against the Lincoln Trust & Savings Bank, a corporation, and George W. Blomgren, receiver of the Lincoln Trust & Savings Bank, for the sum of \$303 and execution awarded.

The original action was started February 4, 1931, against the Lincoln Trust & Savings Bank. Subsequently, George W. Blomgren was appointed receiver of this bank and after the trial was started an order of court was entered giving leave to the plaintiff to make George W. Blomgren, receiver of the Lincoln Trust & Savings Bank, an additional party defendant and the trial proceeded to final judgment. The receiver was not served with any notice that he had been made an additional party to the suit nor was his appearance entered. The trial was had by the court without a jury and the issues were found in favor of the plaintiff and against the defendants Blomgren, receiver of the Lincoln Trust & Savings Bank, and the Lincoln Trust & Savings Bank, and execution ordered to issue against these defendants.

The judgment is erroneous. In a judgment against a receiver no execution could be awarded, but the judgment is only payable out of funds in the hands of the receiver in the due course

Options filed June 30, 1934

of administration. Moreover, the judgment could not be a joint judgment against these two defendants as the satisfaction against one would be out of funds in Blomgren's hands as receiver, to be paid in the due course of administration, while the judgment against the other would be satisfied by levying execution.

A judgment in an action at law is a unit and must run against all alike. It being impossible to separate the judgment in this court (Belke v. Bush, et al., 213 Ill. App. 29), the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, F.J. AND HEBEL, J. CONCUR.

100



37236

EDWIN P. SNOW, et al on appeal of  
HOWARD S. BECHTOLT,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF  
CHICAGO, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

276 I.A. 600<sup>4</sup>

Opinion filed June 20, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court in Chancery, denying leave to the complainants to file their original bill in the nature of a supplemental bill.

The original bill of complaint in the cause was filed by one Edwin P. Snow, and others, as taxpayers on their own behalf and on behalf of such other taxpayers of the City of Chicago as might be similiarly situated and choose to join. The defendants were the Board of Education of the City of Chicago, a body corporate, its officers, and Edward J. Kelly, Mayor of the City of Chicago, James A. Kearns, Treasurer of the City of Chicago, and Robert Upham, Comptroller of the City of Chicago, respectively.

The bill charges that the City of Chicago is a municipal corporation existing under the laws of the State of Illinois; that on the 24th day of May, 1933, at a regular meeting of the Board of Education a resolution was adopted declaring the school year of 1933 at an end on June 9, 1933, and on the 28th day of June a resolution was adopted as an economy measure, that the opening of schools be postponed until September 18th; that the Board of Education by its rules, opened its regular meeting at 2:00 o'clock in the afternoon; that on July 12th, said meeting did not convene until 5:30 o'clock in the afternoon, and that prior thereto certsin members of the Board of Education had met secretly and agreed to pass certain

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resolutions which afterwards were presented to the meeting on July 12. These resolutions were numbered 33008, 33009 and 33010, and on the aforesaid date these resolutions were adopted.

Resolution No. 33008, reduced kindergarten classes, discontinued the parental school at 3600 Foster avenue, discontinued swimming pools and provided for certain other economies;

Resolution No. 33009 provided for the discontinuance of Crane Junior College;

Resolution No. 33010, discontinued the junior high school type of instruction.

The bill further charges that the president of the Board issued a statement known as 33007 setting forth the reasons for the proposed economies; charges that the statement and recitals contained in the statement No. 33007, were untrue and incorrect and that the school courses and activities curtailed by resolutions Nos. 33008, 33009 and 33010 are unnecessary. The bill further charges that the fiscal year of the Board of Education of the City of Chicago commenced on the first day of January of each calendar year and that at a regular meeting of the Board of Education held January 30, 1933, a resolution was passed which was termed the "Annual School Budget" for that year. This resolution is numbered 32586 and under it the Board appropriated such sums of money as were claimed necessary to meet liabilities as shown by the estimates of moneys that would be received for the purpose of operating the schools under the care of the Board; charges further that a large number of school teachers and principals duly appointed and who have given satisfactory services and had been employed by the Board of Education, are entitled to receive compensation as salaries for the balance of the year 1933 at the rates of salary provided but that the Board was attempting to abolish these positions, and transfer others in the school system



at a lower rate of salary; charges that it is the duty of the Board to furnish and maintain schools throughout the nine months in each year and included among this number are the principal schools referred to in the resolution already set forth; that the abolition of the kindergarten classes in Chicago disregards a number of children and creates an arbitrary and unreasonable discrimination among them; charges that the deficit mentioned as of July 12th is wilfully and wrongfully distorted in that certain legislation of the General Assembly of the State of Illinois has provided for the alleged deficit of \$21,000,000; charges that the threatened acts of the Board of Education are contrary to and in violation of the constitutional rights of the plaintiffs, and if carried out will result in the unwarranted transfer of pupils in the Chicago School District and will require a rearrangement of the system. The bill prays for an answer and that the defendant be enjoined from further carrying out or attempting to enforce any of the terms and provisions of the resolution referred to or from attempting to discontinue certain schools or reducing the number of teachers and for such other relief as shall be deemed proper.

Defendants filed their answer admitting the passage of the resolutions but denying certain allegations in the bill of complaint, and insisting that the acts done were warranted by reason of the fact that moneys would not be sufficient for the needs of the school unless the economies provided for by the resolutions were effected.

The original bill of complaint was filed August 2, 1933. A motion for a temporary injunction made by the complainants was denied August 3, 1933. August 23, 1933, complainants presented their petition to the chancellor of the Circuit court asking for leave to file their original bill in the nature of a supplemental bill which was denied and from which order this appeal has been taken. The



petition of complainants for leave to file their original bill in the nature of a supplemental bill was verified and charged that there had been instituted since the filing of the original bill of complaint three other suits involving the same issues which threaten to reach a final decision before the cause in which complainants had filed their bill could be reached. That if any one or more of these should be passed upon prior to the suit herein, such decision could be pleaded as res adjudicata in the pending action. Petitioners therefore sought leave to file their original bill in the nature of a supplemental bill, setting forth these suits in detail and asking that the court protect its jurisdiction over the cause by enjoining further prosecutions of these other pending suits. Each of these other suits is also by and on behalf of taxpayers.

The first of these suits is that of Nye v. Board of Education and was filed August 15, 1933. The second suit is that of Groves v. Board of Education, and the bill of complaint was filed August 15, 1933. The third and last suit was that of The People, ex rel Landau, et al v. Board of Education, filed August 16, 1933, and was an action in mandamus by which the petitioner sought to compel the Board of Education to expunge from its records the resolutions of July 12th and July 26th, 1933.

On the hearing of this cause on oral argument, it appeared that the first two of these cases, namely, Nye v. Board of Education and Groves v. Board of Education, had been disposed of since the perfecting of the appeal in this suit pending here. The bill of complaint in the Nye case was dismissed August 24, 1933. The bill of complaint in the Groves case was dismissed on motion of complainant without prejudice August 23, 1933.

On May 21, 1934, a motion to dismiss the appeal was filed in this cause now pending here accompanied by a certified copy of an order entered in the case of The People, ex rel Landau v. Board





of Education. This was the suit referred to in the original bill in the nature of a supplemental bill. It now appears that all of the pending cases named in the bill are out of court.

The sole purpose of the original bill in the nature of a supplemental bill, was to make the complainants in the Nye and Grove cases and petitioners in the case of The People, ex rel Landau, parties defendant to the original bill of complaint in order that they might be restrained from proceeding further with their various causes until the court before whom this suit was pending might have an opportunity to pass upon the merits of the original bill. It appearing to this court that these cases are no longer pending but have been dismissed, there could be no useful purpose accomplished in making Nye, Grove and Landau parties to the original bill of complaint filed herein. The relief asked for in the original bill in the nature of a supplemental bill is no longer requisite inasmuch as these suits are no longer pending and there is only a moot question now before this court. Wick v. Chicago Tel. Co. 277 Ill. 338, nor will a court review the action for the purpose only of assessing costs, Wick v. Chicago Tel. Co. supra.

The original bill in the nature of a supplemental bill raised no question involving the merits of the original bill and we have always been disinclined to consider the merits of a proceeding before the trial court has had an opportunity to pass upon such questions. There being only a moot question left for consideration, the appeal will be and hereby is dismissed.

APPEAL DISMISSED.

HALL, P.J. AND HEBEL, J. CONCUR.



37255

THOMAS P. HARRIS, Administrator  
of the estate of Charles W. Street,  
Deceased,

(Plaintiff) Plaintiff in Error,

v.

NEW YORK CENTRAL RAILROAD COMPANY,  
a corporation,

(Defendant) Defendant in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

276 I.A. 601

Opinion filed June 20, 1934

MR. JUSTICE WILSON delivered the opinion of the court.

This is a writ of error to review a judgment of the Circuit Court in favor of the defendant, New York Central Railroad Company, a corporation, and against the plaintiff Thomas P. Harris, Administrator of the estate of Charles W. Street, deceased, for costs. The action is based upon alleged negligence of the defendant in operating one of its engines, as the result of which the plaintiff's intestate was struck by said engine and killed. There were no eyewitnesses to the accident.

From the evidence it appears that the deceased, Charles W. Street, at the time of his death was about 48 years of age, unmarried, with no father or mother living. His only heirs at law and next of kin were a brother and sister to whom he occasionally contributed money. At the time of his death he was employed by the Boston Fuel Company for the purpose of unloading coal from cars placed upon a switch track of that company. The yards of the Fuel Company were located at or near 35th street in the City of Chicago and extended north from 35th street and between Federal street and the tracks of the railroad company. These tracks were elevated and its cars, including the engine in question, are operated over

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Opinion filed June 30, 1934

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Chicago and extended ...  
and the ...  
and its ...

its own right of way, but there is no access to the public. A spur track runs from the main track of the New York Central Railroad alongside the property of the Boston Fuel Company and it was customary to place the cars intended for the Fuel Company on this spur track for the purpose of unloading. The accident happened December 30, 1929.

Blake, a witness called by the plaintiff, testified that he was the president of the Boston Fuel Company, and that on December 29, 1930, the Fuel Company leased this spur track from the defendant. This, however, was a year after the accident and there is no evidence in the record as to whether the Fuel Company had a lease on this spur track in December, 1929. This track was not on the property of the Fuel Company, but on the elevation belonging to the Railroad Company. The coal yard was below the elevation. Blake testified that the deceased was earning between \$20 and \$25 a week and that there was nothing wrong with his health and also that he was a steady worker. There was a clearance between the cars on this spur track and cars on the next track west, which was the track upon which the engine in question was running, of 4½ feet. In cleaning up coal which may have fallen off the cars Blake testified that there was sufficient room to clean up this coal without going on track number 2, which was the main line track just west. He also testified that he knew of no custom by which the New York Central Railroad stationed a man in front of the yard to warn of the approach of trains and had never told his employees that they could rely upon such warning, although the Fuel Company's superintendent might have done so.

Horace Street, a brother of the deceased, testified that his brother's eyesight was good.

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Honorable Street, a brother of the deceased, testified that  
his brother's death was fact.

Dinwiddie, a witness on behalf of plaintiff, testified that on the 30th day of December, 1929, in the morning he was sitting on his porch at 3437 Federal street; that this porch was on the second floor of the building; that he saw two men on top of one of the coal cars; that later they got off and were cleaning up the coal and he heard the shovels ringing against steel; that there was snow on the ground; that his porch was between 300 and 400 feet from the place where the accident happened and that at the time of the accident there were four box cars upon the spur track. The men were west of the cars so that he could not see how the accident happened. He heard an engine coming, looked over the book or paper which he was reading and saw that it was going about 25 miles an hour and he heard a strange voice cry out; that he ran over and found Street had been killed. The weather was hazy, but he had a clear view and it was clear along the track. At the

At the end of plaintiff's evidence the court directed a verdict in favor of the defendant.

Counsel for plaintiff insists that where there are no eyewitnesses to an accident, negligence can be shown by circumstantial evidence and that it was error to direct a verdict in favor of the defendant. It is insisted that the deceased was upon the tracks by invitation of the defendant and was, therefore, an invitee and the railroad, therefore, owed him the duty of exercising ordinary care for his safety, citing Gordon v. Grand Trunk Western Ry. Co., 209 Ill. App. 195. From an examination of the facts in that case it appears that the deceased was employed by the Hooper Grain Company who leased the premises adjacent to the track where freight cars were placed for unloading. It also appears, however, that in order to reach the ele-

Figure 1



vators of the Grain Company it was necessary to cross defendant's tracks which were frequently occupied by freight cars and that it was the custom of railroad employees before moving any cars on the track, where deceased was killed, to give notice thereof. In the case at bar, however, it was not necessary to cross any tracks in order to reach the premises of the Boston Fuel Company, where deceased was employed, nor is there any evidence of a custom on the part of the railroad company to give warning of the approach of trains. It is true that if the accident had happened upon the spur track leased by the Boston Fuel Company, it would have been necessary for the defendant to have ascertained whether any one was working upon said track before operating trains over it. This, because of the fact that the defendant would have knowledge that such spur track was used by the employees of the Boston Fuel Company for the purpose of unloading. This duty, however, cannot be extended to the other tracks occupied and used by defendant.

Most of the cases cited by counsel for plaintiff are railroad crossing cases where both the railroad and the pedestrians have rights different from those of the parties involved in the case at bar. The right of way of the defendant in this case was private property and it owed no obligation to persons not thereupon by invitation. James v. Illinois Central R. Co., 195 Ill. 327.

There was no evidence in the record as to the habits of the deceased as to sobriety and prudence. Newell v. C.C.C. & St. L. Ry., 261 Ill. 505. The only evidence which in any way has any tendency to support this proposition is that of the employer who testified that the deceased was a steady worker. The testimony of Horace Street that his brother's eyesight was good, does not tend to strengthen plaintiff's position. From the evidence it appears that



there was nothing to obstruct Street's view of the oncoming engine and his knowledge from having worked in the vicinity should have warned him that the approach of trains on track No. 2 was likely to occur.

If the trial court had left the question to the jury, it could only have resulted in a speculative verdict based upon the evidence as contained in the record. Under the circumstances, the judgment of the Circuit Court was correct and for the reasons stated in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

Figure 1

100-443887-100

36826

ANGELINA BALDASSARE, formerly  
ANGELINA ARNINA,

Appellee,

vs.

FEDERAL UNION LIFE INSURANCE  
COMPANY OF CINCINNATI, a  
Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

286 I.A. 601<sup>2</sup>

MR. PRESIDING JUSTICE O'CONNOR  
DELIVERED THE OPINION OF THE COURT.

Plaintiff, the beneficiary named in an insurance policy issued by the defendant on the life of her husband, brought suit on the policy. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1173.88, which on appeal to this court was reversed and the cause remanded. 268 Ill. App. 243. We reversed the judgment on the ground that the court unduly restricted the defendant in the admission of evidence and that the verdict and judgment were against the manifest weight of the evidence. The case has been again tried, and there is another verdict and judgment for plaintiff, and the defendant appeals.

The only question in both trials was whether the premium which became due February 6, 1926, was paid. Plaintiff testified that on that date an agent for the insurance company called at her home, as had been his custom, and she paid him \$10.61, the premium for a half year; that the agent gave her a receipt but she had lost it. The agent testified that he called for the annual premium of \$20.41, as was his custom, but he received no money and gave no receipt; that he had a receipt with him for the annual premium, \$20.41, which he had obtained from the home office in Cincinnati, which he was to sign and deliver when he was paid the amount called for by the receipt, but that when he got no money the receipt was returned to the home office. The receipt was produced and is in the record.

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The evidence further shows that on January 21, 1926, plaintiff's then husband, the insured, applied for a loan on the policy in suit. Afterward, February 5th, the insured went to defendant's office in Chicago and signed the necessary papers to effectuate the loan. Later the home office made out its check for the amount of the loan, \$56.35, and sent it to Chicago where the agent took it to plaintiff's home about February 10th. The agent testified that at that time he wanted to deduct the annual premium of \$20.41 from the amount of the check but that the insured demurred, stating he had 31 days within which to pay the premium, and that he would pay it from other moneys within a few days. It further appears from the evidence that June 1, 1926, the insured died as the result of an automobile accident, and there is evidence to the effect that shortly thereafter plaintiff made claim for the money under the policy, which was refused on the ground that the policy had lapsed for failure to pay the premium that fell due February 6, 1926.

There is other evidence that plaintiff brought suit in the Superior court of Cook county in 1929, but that the case was not tried, and the instant case was begun April 22, 1930, in the Municipal court of Chicago.

There is other evidence in the record as to what occurred after February 6, 1926, and after the insured died, June 1, 1926, that would tend to throw light on the controlling question as to whether the premium was paid on February 6th, but we think it would serve no useful purpose to discuss it in detail.

Joseph E. Roy, called by the defendant, testified that he was a life insurance agent employed by the defendant in February, 1926, but was not so employed at the time of the trial; that about two years after the death of the insured plaintiff and her attorney, Mr. Breakstone, came into his office at 117 North Dearborn street, Chicago; that he did not talk to plaintiff but the conversation was





with the attorney.

Upon objection the court refused to permit the witness to testify as to what was said at that time by himself and Breakstone, and thereupon counsel for the defendant, out of the presence of the jury, offered to show that if the witness were permitted, he would testify that at that time the attorney, in the presence of the plaintiff, asked for blanks so that proof could be made of the death of the insured; that the witness refused to give him these blanks because the premium had not been paid, and the policy had lapsed for that reason; and that the attorney replied that he knew the premium was not paid but that there was sufficient money paid to carry the policy beyond the time of the death of the insured, and that the witness replied that there was no extended insurance because the full loan value of the policy had been borrowed by the insured.

Counsel for the defendant contends that the ruling was erroneous and that this evidence should have been admitted because the conversation took place in plaintiff's presence; that "Breakstone's statement was made as an admission of a material fact against plaintiff's interests and was binding on the plaintiff." In support of this the cases of Matzenbaugh v. The People, 194 Ill. 108, and Dorn v. Hollenbeck, 142 Ill. App. 439, are cited.

The Matzenbaugh case was an appeal from a judgment and order of sale which involved the assessment of property. Matzenbaugh claimed he had removed from Illinois to Texas and therefore certain property was not assessable in this State. It was held that the court erred in refusing to let Matzenbaugh testify as to his own declarations concerning his intention of moving to Texas. In that case it appeared that a Mrs. Fisher was the agent of Matzenbaugh concerning some property which was involved in the taxation. The court said it was well established that Mrs. Fisher was the



agent of Katzenbach, that she was performing an act as agent and within the scope of her power in that capacity, and that the declarations were in relation to the transaction then being performed by her as agent. It was held her declarations were competent to be received in evidence against Katzenbach.

In the Dorn case the statement held to be admissible was not made by an agent or attorney but by the defendant himself. The court there said (p. 442): "In 1 Greenleaf on Evidence, section 192, the rule is announced that though offers and propositions of settlement cannot be given in evidence, for the reason that a man must be permitted to offer to buy his peace without prejudice, yet independent admissions made during an effort to compromise may be given in evidence against the party making them, at least unless they are expressly stated to be made in confidence or without prejudice." We think it clear that neither of these cases is in point. In the Katzenbach case the admission was made by an agent who was authorized to do the act concerning which the testimony was offered; while in the instant case we must assume that counsel was employed by plaintiff to collect the policy and not make admissions that would tend to defeat her claim. In the Dorn case the admission was made by the defendant and there was apparently an attempt to compromise or settle the controversy, while in the instant case there was no suggestion of any compromise.

We hold the only theory on which the evidence might be admissible was that plaintiff would be expected to speak up when counsel stated the premium had not been paid and deny that it had not been paid. But in view of all the facts we think it could hardly be expected that plaintiff, who appears to be a woman of limited education and not very familiar with the English language, would speak up and say that she had paid the premium. See Ricks v. Manufacturing Co., 138 Carolina, 319; 1 Greenleaf on Evidence (13th



Ed.) sec. 186.

In the Richs case the court, in discussing admissions made by attorneys on a former trial of the case as to whether such admissions were admissible on another trial of the same case, said (p. 323): "The evidence in the proposed testimony was held incompetent by the trial judge and the defendant excepted. These declarations were not made at a place nor under circumstances where the plaintiff could be expected or permitted to protest or reply, and derive no force therefore from the fact that the plaintiff may have been present when the statement was made. If held competent, it must be on the ground that the plaintiff is bound in this instance by the admissions of his attorney." The court held the evidence was properly excluded.

And in discussing this same question, Greenleaf, in the section cited, says that admissions of attorneys of record bind their clients in all matters relating to the progress of the trial. "But other admissions, which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. The reason of the distinction is found in the nature and extent of the authority given; the attorney being constituted for the management of the cause in court, and for nothing more."

The defendant further contends that the judgment is against the manifest weight of the evidence and that the verdict shows it was the result of passion and prejudice on the part of the jury. The law imposes the duty on this court to reverse a judgment and remand a cause where the court is of opinion that the verdict and judgment are against the manifest weight of the evidence. Dorrlson v. East St. L. & Suburban Ry. Co., 235 Ill. 626.

While on the former appeal in this case, one of the reasons why we reversed the judgment and remanded the cause was that the



verdict and judgment were against the manifest weight of the evidence, and while on the retrial the evidence is substantially the same, although probably there is more evidence in the record before us tending to sustain the defendant's position that the premium was not paid on February 6, 1926, than on the former record, yet we are of opinion that where two juries and two trial judges have seen and heard the witnesses and the verdict and judgment in each case has been in favor of the plaintiff, we would not be warranted in disturbing the verdict and judgment the second time on the ground that it is against the manifest weight of the evidence. While from a reading of the printed page (were the responsibility ours) we might find in favor of the defendant, yet two judges and two juries had opportunities much superior to ours.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.





37447

THE PEOPLE OF THE STATE OF ILLINOIS,  
etc., ARTHUR H. MEYER, Receiver,  
EDWARD H. SCHWARTZ, Intervening  
Petitioner,

Appellees,

vs.

THE KASPAR-AMERICAN STATE BANK,  
Appellant.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

276 I.A. 601<sup>c</sup>

MR. PRESIDING JUSTICE O'CONNOR  
DELIVERED THE OPINION OF THE COURT.

The Kaspar-American State bank was closed and the Auditor of Public Accounts appointed Arthur H. Meyer receiver. The appointment was later confirmed by the Superior court of Cook county and the receiver qualified and entered upon his duties. Two other suits were brought in the Superior court of Cook county to enforce the liability of the stockholders. Roman Chaitlen, Complainant, v. Kaspar-American State Bank, a Corporation, et al., 560228, and Beverly Fuel Company, a Corporation, Complainant, v. Kaspar-American State Bank, a Corporation, et al., 560223. These two cases are said to have been consolidated, and an order was entered in the consolidated case appointing Samuel H. Ballis receiver to collect from the stockholders the liability imposed upon them. Afterward an order was entered on motion of the defendant State Bank that its solicitors be given notice of all future proceedings in the case.

December 15, 1933, Edward H. Schwartz filed his verified petition, setting up the foregoing facts; and further, that an order was entered by the Superior court in the suit brought to enforce the stockholders' liability, authorizing Ballis as receiver to have an audit made for the purpose of determining the liability of the stockholders and that he was authorized to employ the petitioner, Schwartz, to make such audit and pay the petitioner \$4375 "for the services to be rendered by him in preparing the said audit;" that pursuant to the order the petitioner made the audit and reported



to Ballis, the receiver on April 15, 1933.

Petitioner further alleged "that he is informed and believes" that Ballis has no funds to pay petitioner for making the audit; that an order was entered restraining the receiver appointed by the Auditor of Public Accounts from paying dividends to depositors who had been stockholders of the bank, and from delivering to such stockholders collateral deposited by them with the bank until the liability of the stockholders could be determined and satisfied; that the receiver appointed by the Auditor of Public Accounts has paid two dividends, one of 10 per cent and one of 15 per cent to the depositors, excepting those depositors who were stockholders, and that such depositors were not paid on account of the restraining order above mentioned; that the petitioner "is informed and believes that the said Arthur H. Meyer, receiver of said bank, has moneys on hand belonging to various stockholders who are depositors of said bank, more than sufficient to defray the expenses of said audit;" that in the ordinary course, Ballis, the receiver, will collect a substantial amount from the stockholders on account of their respective liabilities, but that this collection involves considerable delay; that the payment of the petitioner's \$4375 will inure to the benefit of all the creditors of the bank; that he employed 14 assistants to make the audit of the bank and advanced large sums of money to pay such assistants and has received no payment for the work he did; that if Meyer, the receiver appointed by the auditor, is authorized to advance the necessary funds to pay petitioner's bill, such receiver should be reimbursed by receiver Ballis out of the moneys collected from the stockholders on account of their liability as such stockholders.

The prayer of the petition is that an order be entered authorizing Meyer, the auditor's receiver, to advance to the petitioner \$4375 in payment of services, upon condition that Ballis, the



receiver in the suit to enforce the stockholders' liability, shall repay the receiver, Meyer, the \$4375 out of the moneys collected by Ballis.

A notice dated December 14, 1933, appears in the record, that attorneys for Schwartz would present the petition and ask for an order in accordance with the prayer of it. It is addressed to the attorneys for the receiver Meyer and to the Attorney General, and both have acknowledged receipt of the notice. However, the notice was not served on the solicitors for the Kaspar-American State Bank as the court on January 23, 1933, ordered.

Upon the filing of the petition by Schwartz the court entered an order giving the receiver Meyer ten days to answer, and the matter was set for hearing. January 5th following receiver Meyer filed his verified answer, in which he admits that Ballis was appointed receiver to enforce the liability of the stockholders of the bank; it neither admits nor denies that Ballis was authorized to employ the petitioner to make an audit of the books of the bank to determine the liability of the stockholders, and neither admits nor denies that Ballis was authorized to pay \$4375 for such services. The answer further set up that Meyer is informed and believes that the audit was made by the petitioner; admits the entering of the order restraining Meyer, as alleged in the petition, and states that Meyer has now on deposit nearly \$24,000, which he is holding in accordance with the restraining order, with would otherwise be payable to the stockholders of the bank. The answer calls for strict proof of all the allegations not admitted. Fifteen days after the filing of the answer an order was entered which recites that the matter came on to be heard on the petition of Schwartz for an order directing Meyer to advance \$4375 for the purpose of paying Schwartz for the services rendered in the preparation of the audit made by Schwartz, "and it appearing to the Court that all parties in interest have had due



notice of the presentation of said petition, and the court having considered said petition, having heard the arguments of counsel," finds, among other things, that Ballis, the receiver, was authorized to employ Schwartz to make the audit at a cost of \$4375; that Schwartz had made the audit and had not been paid; that the receiver, Meyer, had in his possession considerable sums of money and other assets belonging to the stockholders of the bank which were held by him under the restraining order above mentioned, which was more than sufficient to defray the cost of making the audit. Meyer was authorized by the order to advance to Ballis, the receiver, \$4375 to pay Schwartz provided he (Meyer) should take appropriate steps to secure the repayment to him of said sum out of the first moneys collected by Ballis, and it was further ordered that Ballis be directed to repay Meyer the \$4375 out of the first moneys collected by him.

From this order the defendant, Kaspar-American State Bank, prosecutes this appeal, and in support of the appeal it is said that <sup>should</sup> the order be reversed because the court had no jurisdiction of the matter, defendant's counsel not having been notified of the application to file the petition, or of the hearing on it, which was contrary to the order of the court entered several months before the petition was presented and contrary to the rules of court. Obviously this contention cannot be sustained so far as the jurisdiction of the court is concerned. The court had jurisdiction of the matter, but it was erroneous for the court to proceed without notice to the solicitors of the defendant Bank, as theretofore ordered. We think it apparent that the order entered several months prior, requiring notice to be given to the solicitors of defendant Bank, was not brought to the attention of the chancellor. The answer to the contention by counsel for the petitioner is that although the notice is addressed to certain parties, the record does not "certify that





the defendant did not have notice" and on the contrary the order entered by the court recites that "all parties in interest have had due notice of the presentation of the petition," and that the recital of the order overcomes the contention that no notice was served. We think it clear that the parties were not notified.

But we are clear that the order cannot stand for any reason. The receiver, Ballis, was the one vitally interested and he was not a party to the proceeding at all. The proceeding was anomalous in that a creditor of the receiver Ballis is asking that the receiver appointed by the auditor loan money to the receiver, Ballis. The request should have come from Ballis. Furthermore, so far as the record discloses, there was no hearing on the petition and answer because the record does not show that any evidence was heard, and the answer called for proof of a number of matters alleged in the petition.

For the reasons stated, the order of the Superior court of Cook county is reversed and the matter remanded.

REVERSED AND REMANDED.

McSurely and Hatchett, JJ., concur.



37506

GILES McCLENDON,

Appellee,

vs.

MYRTLE WALL, FANNIE COWAN,  
MARY BANKS, LAURA HARDWICK  
TOLES and WILLIAM J. FRANKLIN,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

286 I.A. 601<sup>4</sup>

MR. PRESIDING JUSTICE O'CONNOR  
DELIVERED THE OPINION OF THE COURT.

June 15, 1928, complainant, Giles McClendon, filed his bill to remove clouds from his title to a piece of real estate known as 3140-42 Prairie avenue, Chicago, improved by a six flat building, which he claimed to own. The case was referred to a master in chancery who took the evidence (which is voluminous), made up his report and recommended that a decree be entered as prayed for in the bill. Objections to the report filed by some of the defendants were overruled, and on the coming in of the report they were ordered to stand as exceptions. The exceptions were overruled by the chancellor and a decree entered in accordance with the recommendations of the master, and defendants Mary Banks, Lizzie Franklin, administratrix of the estate of William J. Franklin, deceased, and Laura Hardwick Toles prosecute this appeal.

The record discloses that Giles McClendon, the complainant, is a colored man about 90 years of age. He bought the property in question, improved by a three story stone and brick building containing six flats, in 1917 for \$22,000. During the pendency of the instant case he was declared by the Probate court of Cook county a distracted person and a conservator was appointed for him and a guardian ad litem represents him in this case. He is a man of little or no education but was able to write his name.

The defendant Myrtle Wall owned a piece of improved real estate located at 50th and State streets, Chicago, which was in foreclosure; March 15, 1928, she conveyed her property by warranty

11. Intermittent

1992 2000 2008

1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

1900-1901

deed to complainant, Giles McClendon, and at the same time a warranty deed purporting to be executed by Giles McClendon conveyed his property on Prairie avenue to her. McClendon's property was clear of encumbrance and it is his contention that he never executed the deed and that the document is a forgery. After the execution of these two deeds Myrtle Wall on March 29, 1928, executed a warranty deed purporting to convey the Prairie avenue property to defendant Fannie Cowan; on May 1st Fannie Cowan executed two trust deeds, one securing an indebtedness for \$7000, which trust deed was not recorded until August 11, 1928, and the other securing an indebtedness of \$8000 which was not recorded until November 30, 1928. On the same day, May 1, 1928, Fannie Cowan conveyed the premises by warranty deed to the defendant Mary Banks subject to two mortgages. May 7, 1928, the complainant, Giles McClendon, filed an affidavit in the recorder's office, in which he denied that he executed the warranty deed above referred to, to Myrtle Wall, and averred that he is the absolute owner of the property; June 15, 1928, he filed his bill in the instant case to remove the several transfers above mentioned as well as the trust deeds.

The defendant Laura Hardwick Toles claims to have purchased the \$8000 mortgage and defendant William J. Franklin the \$7000 mortgage, in good faith. The defendant Mary Banks claims to be the owner of the property and that the exchange of the properties between Myrtle Wall and the complainant on March 15, 1928, was bona fides in every particular, and that she, Mary Banks, went into possession of one of the flats of the Prairie avenue property June 13, 1928, and is still living in the apartment.

Mary Banks' position is that while the property conveyed by Myrtle Wall March 15, 1928, was encumbered and in foreclosure and a receiver in possession, yet it was much more valuable than complainant's property on Prairie avenue, and that in the exchange of the



properties this fact was taken into consideration. It further appears from the evidence that July 3, 1928, a decree of foreclosure was entered by the Superior court of Cook county, foreclosing the mortgage on the property which Myrtle Wall purported to convey to the complainant. The property was sold under the decree July 27, 1928, for \$41,500, which was apparently the amount found due by the decree, and the sale was confirmed July 31, 1928.

There is also evidence to the effect that Mary Banks surreptitiously took possession of one of the apartments of the Prairie avenue property, but there is evidence also to the contrary. All the evidence is to the effect that complainant never relinquished possession of his property and never attempted to take possession of the property at 50th and State streets, and further, that neither Myrtle Wall nor any of the other defendants attempted to take possession of the Prairie avenue property until Mary Banks took possession of the flat June 13th as above stated.

It further appears that after Mary Banks was in possession a forcible detainer suit was brought against her by the complainant in the Municipal court of Chicago, and he obtained a judgment for possession. Afterward the court, in the instant case, entered a restraining order permitting her to remain in the apartment pending the hearing, upon her giving bond with surety for the payment of any rent that might be found due, in case the suit was decided against her.

To sustain the contention of defendant Mary Banks that the exchange of the properties was fair and equitable, a witness in her behalf testified that the property at 50th and State streets was worth in March, 1928, \$100,000. Evidence was also offered by the defendant to the effect that McClendon signed the deed which purported to convey his Prairie avenue property on March 18, 1928, while complainant testified that he did not execute any deed to the





premises. The evidence on this point is in direct conflict.

The master saw and heard the witnesses and found that the deed was a forgery; he further found that even if the deed was not a forgery, the exchange was wholly inequitable and that a court of equity would set it aside because McClendon was an old, feeble and wholly incompetent man at the time. The master's finding has been approved by the chancellor, and upon a careful consideration of all the evidence in the record we are of opinion that the finding that the deed was a forgery was not against the manifest weight of the evidence.

We are further of the opinion that the overwhelming weight of the evidence is that complainant was wholly incompetent and the purported exchange of properties a fraud upon him. He had paid \$22,000 for his property, and at that time he had a real estate agent renting and managing it for him. He was not represented by anyone at the time the alleged exchange was made. On the other hand, the property which Myrtle Wall purported to transfer to him in exchange for his was heavily encumbered and was then in possession of a receiver in a foreclosure suit pending in the Superior court of Cook county, which shortly afterward ripened into a decree and sale. Under these circumstances it is obvious that if complainant knew what he was doing, he would not convey his clear property for the property at 50th and State streets. All the evidence stamps the transaction as a gross fraud on McClendon.

Moreover, Dr. Daley, a physician who graduated from the Northwestern Medical School, testified that he operated on complainant in 1923 and removed the prostate gland, and that at that time complainant was a man of feeble mind; that he saw him at various times for a year or so after the operation and his mental status was very poor; that in his opinion complainant had a form of senile dementia. Afterward, in November, 1928, a jury in the Probate court



of Cook county, after a hearing, found that complainant was a distracted person and incapable of managing or controlling his property.

As to the two mortgages of \$7000 and \$8000 claimed to be owned by defendants Laura Hardwick Toles and William J. Franklin, the master found that throughout the several transactions no lawyers were engaged, no abstracts of title furnished, no checks were passed, and the testimony was that several thousands of dollars in cash and liberty bonds kept in vaults were turned over without advice of counsel; that there was no showing of how the cash and securities were earned or obtained, and that the mortgages and deeds of trust appeared to have been recorded months after they were alleged to have been executed; that the junior mortgage was recorded before the senior mortgage; that defendant Franklin testified that he bought the trust deed securing the \$7000 note from Fannie Cowan in June, 1928; that he paid \$1500 in cash and gave a \$4000 mortgage; that he did not state the exact date when he acquired the note and trust deed; that he testified he carried the trust deed in his pocket for several months without recording it; that this trust deed was not a valid lien but was void because Fannie Cowan had no interest in the property; that Laura Hardwick Toles was not an innocent purchaser because, before she bought the note and trust deed, the affidavit made by McClendon that he had not executed the deed conveying the premises was filed May 7th, 1928, in the recorder's office of Cook county, and that the bill was filed June 15th; while Franklin states he bought the note and trust deed in June, but does not give the date. The master therefore concluded that he was not a bona fide holder.

As to the other trust deed securing the \$8000 note, the master finds that defendant Toles testified she paid \$2000 in cash and the balance in liberty bonds; that the trust deed was void and conveyed no interest in the property. This trust deed was not recorded until November 30, 1928, several months after McClendon's affidavit was



filed for record, and after the bill was filed in the instant case.

Counsel for the defendants makes point XI in his Brief of Points and Authorities, and says that before the master's report was submitted to the chancellor defendant Mary Banks discovered that the chancellor was prejudiced and filed a petition for a change of venue, and that the court erred in denying the prayer of the petition. This point is not argued by counsel, and under Rule 7 of this court it might be considered as waived. However, this petition was filed October 23, 1933. The chancellor in ruling on the motion stated that the petition was filed after the master's report had been filed and after he had fixed the master's and stenographers' fees and "had made several motions on the part of the party now making the motion for a change of venue."

We think the motion was too late and that it was properly denied.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely and Ketchett, JJ., concur.



37061

STAVE PROCOPOUR,  
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

276 I.A. 601<sup>st</sup>

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon a policy of insurance issued by the defendant to recover indemnity for injuries arising from an accident. Upon trial by the court he had judgment for \$609.40, from which defendant appeals.

By the terms of the policy defendant agreed to pay benefits if the insured should become totally and permanently disabled from any cause to such an extent that he is rendered wholly, continuously and permanently unable to engage in any gainful occupation during the remainder of his lifetime.

The trial started before a jury. Plaintiff testified that on September 20, 1930, while employed as a baker he had a fall which injured his back; that he was taken home, confined to his bed for some days, then taken to a hospital where X-ray pictures were taken; that he reported to the insurance company; that when he walks he suffers pain; that he has tried but is unable to do any work since receiving the injury; that he tried to cut the grass and clean the basement but cannot bend his back; that he gets a sharp pain in the lower part of his body and becomes dizzy; that this has been his condition continuously since the date he was injured.

Doctor Cirilin testified that he had examined the plaintiff about December, 1932; that he found a limitation in the body movements backward and forward; that he found at the lower end of the spine a rigidity and could feel some mass, or something, holding the fourth and fifth vertebrae together; they seemed to be united

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science.



or fused by bone growth.

At this point in the trial the parties entered into a stipulation that a juror should be withdrawn and the trial proceed before the court without a jury. This was done. Defendant's points made upon this appeal question what took place under this stipulation.

When the court excused the jury it stated in the presence of both counsel that the only question in the case was whether the plaintiff was permanently disabled, and that counsel had stipulated that the court could select a doctor who should examine the plaintiff and also X-ray pictures and report to the court, and that the court would decide in accordance with the report of this Doctor. The case was then taken under advisement by the court.

When the court took up the case some months thereafter the attorney for the defendant offered the record taken upon a prior trial of this case. This precipitated some discussion as to whether it was proper under the stipulation, and the court stated in the record its version of the stipulation. The court said that when the counsel retired to chambers the court was informed that the only question in the case was whether the plaintiff was actually permanently disabled under the terms of the policy; that after some discussion it was stipulated that a juror was to be withdrawn and the cause presented to the court for decision; that all of the questions involved except that of disability were to be decided in favor of the plaintiff; that the court was to select a doctor to make a thorough examination of the plaintiff and the x-rays who was to furnish the court with a written opinion on the question of total, permanent disability under the policy, and the court was to decide the issues of the case upon such written report, the defendant agreeing to pay the doctor for his services, that thereupon the court appointed Dr. James Whitney Hall to examine the plaintiff



and to report; that such an examination was made, and the defendant, pursuant to the stipulation, paid Dr. Hall \$75 for his services, and that Dr. Hall had submitted his written report. The court further stated that while he would receive and examine the record of the evidence taken at the prior trial he would entertain a motion to strike the same; subsequently the court sustained a motion to strike this evidence from the record.

Dr. Hall was sworn, the court stating that there would be no cross examination, but that the Doctor was put on the stand to get his written opinion in the record. Dr. Hall then testified that he was the physician appointed by the court, that he examined plaintiff and also X-ray pictures and that his opinion as to plaintiff's condition was stated in the written report. The Doctor's testimony and report were to the effect that there was an ankylosis in the lower joints of the spine; that this condition would grow worse; that in his opinion plaintiff was suffering from cancer of the bone and that he was continuously and permanently unable to engage in any gainful occupation. It was the Doctor's best judgment that plaintiff was permanently disabled.

Defendant argues that as the examination of the plaintiff by Dr. Hall took place in June, 1933, the Doctor's testimony throws no light on plaintiff's condition from September 20, 1930, the date of the injury, to the time of the examination. The answer to this is found in plaintiff's testimony and in the supporting testimony of Dr. Cirlin as to plaintiff's condition during this period of time. Furthermore, the stipulation left open for decision only the question as to the permanency of plaintiff's condition. All other questions were, by the stipulation, to be decided in favor of plaintiff.

Defendant complains that it was not allowed to cross-examine Dr. Hall. The parties had stipulated that the question of the

The first part of the report deals with the general situation of the country. It is a very interesting and detailed account of the political and social conditions. The author has done a great deal of research and has gathered a wealth of material. The second part of the report is a study of the economic situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The third part of the report is a study of the educational situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The fourth part of the report is a study of the cultural situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The fifth part of the report is a study of the religious situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The sixth part of the report is a study of the legal situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The seventh part of the report is a study of the military situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The eighth part of the report is a study of the diplomatic situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The ninth part of the report is a study of the international situation. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material. The tenth part of the report is a study of the future of the country. It is a very thorough and well-written study. The author has done a great deal of research and has gathered a wealth of material.

permanency of plaintiff's condition was to be decided by the court upon the report of the doctor appointed by it, "without evidence and without argument." Dr. Hall was put upon the stand to identify and confirm his written report. Moreover, counsel for defendant did not attempt to cross examine the doctor.

The evidence heard upon the former trial was not offered for the purpose of impeachment and the court properly struck it. Moreover, under the stipulation, all questions which might have been raised by the evidence upon the former trial were excluded.

We see no reason to disagree with the conclusion of the trial court, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

O'Conner, P. J., and Ketchett, J., concur.



37147

EUGENE R. SULLIVAN,  
Appellee,

vs.

ANDREW SCHMITZ,  
Appellant.

~~APPEAL FROM SUPERIOR COURT~~  
OF COOK COUNTY.

276 I.A. 6021

MR. JUSTICE McDERMOT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that Bird-Sykes Company, a corporation, C. W. Williams and Andrew Schmitz had sold and delivered to him an automobile for which he paid \$990; that subsequently it was taken from him by writ of replevin by the holders of a conditional sales contract, and upon trial of the replevin suit the lien of this contract was sustained and the possession awarded to the lienor. Plaintiff charged that the defendants knew when they sold the automobile to him that it was subject to the lien of this sales contract and that they fraudulently concealed said fact from plaintiff and by means thereof deprived him of the amount of money paid by him for the purchase of the automobile.

Defendant Williams was not served with summons. The case proceeded to trial against the other two defendants. Plaintiff took a non-suit as to the Bird-Sykes company. The jury returned a verdict finding defendant Andrew Schmitz guilty and assessed the plaintiff's damages at \$990. Judgment was entered on the verdict and defendant Schmitz appeals.

Plaintiff and defendant give different versions of the transaction. Plaintiff says that in October, 1928, he was considering purchasing an automobile; that he called at the place of business of the Bird-Sykes company and examined a Graham-Paige automobile; that later on he saw a "credit" for sale advertisement in a newspaper and got in touch with the advertiser, C. W. Williams, who took plaintiff to Niles Center where plaintiff had an interview





with defendant Schmitz; plaintiff told Schmitz that he wanted to buy Mr. Williams' credit and wanted it to be applied on the purchase of an automobile; Williams had traded in a Lincoln coupe automobile to Schmitz who allowed Williams a credit of \$450. for it; plaintiff paid \$300 to Williams for this credit with Schmitz and received from Schmitz a writing on the letterhead of Schmitz, who was described as a "Distributor Paige & Jewett Motor Cars - Niles Center, Ill." The document is dated October 20, 1928, and purports to sell to plaintiff one Graham-Paige automobile for \$1100, to be delivered on or before March 1, 1929, upon which plaintiff was allowed a credit of \$450, evidently the credit Williams had with Schmitz and which plaintiff had purchased from Williams.

Plaintiff says Schmitz told him he was going to Florida and Williams would take care of the business and deliver the car to plaintiff. Plaintiff had ascertained from the Bird-Sykes people that Schmitz was an authorized dealer and was one of its principal customers.

March 2, 1929, Williams delivered the automobile to plaintiff and plaintiff paid him \$690, the balance of the purchase price, receiving a receipt for this amount from Williams; about two months thereafter plaintiff reported to Schmitz that the car needed to be "tightened up" and Schmitz told plaintiff to take the car to the Bird-Sykes people and have them do the work; plaintiff did so, and when payment for the work was requested of plaintiff he told the Bird-Sykes people that Mr. Schmitz was to pay for same. The following August a deputy sheriff took the car from plaintiff under a writ of replevin, in which case it was subsequently adjudged that Walter E. Heller & Company was entitled to possession of the automobile under a conditional sales contract. Plaintiff reported this to Schmitz and testified that Schmitz promised to give him another

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car by Thanksgiving; that when plaintiff about that time demanded that Schmitz give him a car, Schmitz promised to do this about Christmas; that plaintiff called at Schmitz's place of business about Christmas and was informed that Mr. Schmitz was in Florida. Plaintiff never received another car for the money he had paid.

Mr. Schmitz, testifying, corroborated plaintiff's testimony as to their interview in October, 1928; he says he told plaintiff the price and told him he wanted \$300 paid down, and that plaintiff promised to bring the money in a few days, which he did, and defendant gave him the sales memorandum giving plaintiff the Williams credit of \$450. Defendant says he never sold the car to plaintiff; that he did not tell plaintiff that Williams would close the deal for him, defendant, while he was in Florida; defendant admits that when plaintiff called upon him, reporting that the car had been taken from him by the replevin writ, defendant offered to give him another car as he "felt sorry for him;" that defendant may have promised to give him another car by Thanksgiving. Defendant testified that he never got any money from plaintiff on the deal. Defendant admitted that he gave Williams a credit of \$450 on account of the Lincoln coupe.

Defendant says in this court that the declaration is insufficient to support the verdict of the jury because there is a failure of proof that defendant Schmitz sold the Graham-Paige automobile to plaintiff. But the argument goes to the insufficiency of the evidence rather than the insufficiency of the declaration.

As we have said, there was a conflict in some important points between the versions of the respective parties. It is well established that under such circumstances a court of review will not disturb the conclusion of the jury unless its verdict is manifestly against the weight of the evidence. In the instant case the



jury had a better opportunity than we have of observing the conduct and demeanor of the witnesses testifying and of passing upon the questions of fact presented. The jury evidently accepted the version of the plaintiff, and under the circumstances we cannot say this was palpable error.

The objection to the introduction of the memorandum of sale is without merit. It was material as tending to show, by the writing of defendant Schmitz, the nature of the transaction.

The question for the jury to determine was whether Schmitz or Williams had sold the automobile to plaintiff, and defendant argues that the evidence shows that it was Williams. The circumstances tend to support plaintiff's version. If, as indicated, Schmitz had possession of the Lincoln coupe traded to him by Williams, then Williams was entitled to the credit of \$150. Schmitz concedes this to be the fact. It follows that the \$300 plaintiff paid for this credit belonged to Williams, who was selling for this sum his \$450 credit with Schmitz. Schmitz was not entitled to any part of this down payment. The question then is narrowed down to whether Schmitz authorized plaintiff to pay Williams the balance of the purchase price upon delivery of the car by Williams to plaintiff. This was the version of the transaction which was accepted by the jury. We cannot say that this was not justified from the evidence.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Watchett, J., concur.



37357

JACOB GOLDBERG,

Plaintiff in Error,

vs.

WESLEY G. BENDER,

Defendant in Error.

BRANCH TO CIRCUIT COURT  
OF COOK COUNTY.

276 I.A. 602<sup>2</sup>

MR. JUSTICE McGURRY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff brings in review the proceedings in an action of trespass on the case which finally resulted in its dismissal for want of prosecution.

The declaration was filed December 8, 1930, wherein plaintiff alleged that he was injured in a collision between an automobile in which he was riding and another automobile negligently driven by defendant. Defendant appeared and filed a plea of not guilty, and on August 4, 1931, notice was served on defendant's attorney to place the cause on the trial calendar.

May 11, 1933, the case was called for trial; neither defendant nor his counsel being present, the plaintiff, on an ex parte hearing, had a judgment for \$10,000. Two days thereafter, on May 13th, and within the term, defendant made a motion to vacate the judgment, supported by an affidavit of Joseph Farley, an attorney for the defendant. He stated that he was formerly a member of the firm of Fitzgerald, Hughes and Farley, the attorneys who had filed the appearance and plea for the defendant; that there were various changes in the firm and that for a time Thomas A. Dillon, an attorney, was an office associate, and that Dillon was retained by the defendant in the cause; that subsequently the firm was dissolved and Dillon and Farley became office associates and Dillon had active control over the case; that on February 15, 1933, Dillon was appointed assistant state's attorney and turned over this case, with others, to Farley; that Farley failed to observe that the





cause was noticed for trial and did not know that it was hearing trial; that on May 11, 1933, an ex parte judgment was entered against the defendant; that the defenses are set up in defendant's plea filed in the case, and the court was requested to permit the defendant to present his defense and have his day in court.

Judge Finneran continued the motion to May 19th, and on this latter date leave was given the defendant to present his defense on June 27th, and it was ordered that the judgment stand as security; Judge Finneran was absent on June 27th and the case was postponed on account of a notice and motion to transfer the case to Judge Klarkowski; Judge Klarkowski declined to entertain this motion and struck it on July 11, 1933; this left the case on Judge Finneran's call, who, on July 17th ordered the cause to be set for trial on July 20th, and on this latter date the judgment of May 11th was vacated and set aside and a new trial was awarded and the case transferred to the executive committee for reassignment. The case was afterward assigned to Judge Burke.

October 10th the case was called for trial by Judge Burke; plaintiff, by his counsel, was present but refused to proceed and declined to introduce any evidence on behalf of plaintiff and stood upon his motion attacking the validity of the order of May 19th permitting the defendant to make his defense, and also the order of July 20th which vacated the judgment of May 11th and awarded a new trial. Thereupon, the plaintiff refusing to proceed, the court ordered the cause dismissed for want of prosecution.

Plaintiff in this court attacks the orders of May 19th and July 20th on the ground, mainly, that the affidavit of Farley was not sufficient to justify vacating the judgment. It is well settled that the action of the trial court in vacating a judgment on motion made during the term will not be reversed unless there has been an abuse of discretion. And courts will be liberal in setting

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aside defaults at the term in which they have been entered where it appears that justice will be promoted thereby. McMurray v. Peabody Coal Co., 281 Ill. 218; Mason v. McNamara, 57 Ill. 274. In Cooper v. Handelsman, 247 Ill. App. 454, plaintiff had an ex parte judgment in the trial court. The opinion states that "defendants counsel were absent through a misunderstanding on their part of the situation" (which is the case here.) After citing chapter 110, section 58 of the Practice act, which leaves to the discretion of the trial judge the question of opening defaults and vacating and modifying judgments within the term, the opinion cites a number of cases supporting the action of the trial court in vacating judgments under such circumstances.

In the instant case Farley's affidavit shows an excusable misunderstanding through the withdrawal from the firm of Dillon, who had charge of this case. Within two days after the judgment was rendered Farley acted to have the judgment vacated. Under the circumstances we cannot say there was any abuse of discretion on the part of the trial court in vacating the judgment and permitting defendant to present his defense. Such an action was in the interest of justice and will not be disturbed by this court.

We find no reversible error in the record, and the order of the Circuit court is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.



37423

ROBERT HILSBURG,  
Defendant in Error,

vs.

GEORGE R. BLUMENSTOCK,  
Plaintiff in Error.

ENCL. TO MUNICIPAL COURT  
OF CHICAGO.

276 I.A. 602<sup>3</sup>

MR. JUSTICE McSweeney DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action based on alleged fraud and deceit had a verdict for \$1,000 upon which judgment was entered. Defendant by this writ of error seeks a reversal.

Many errors occurred upon the trial which would require a reversal and another trial. However, we are of the opinion that upon the evidence presented defendant's motion that a verdict be instructed in his favor should have been allowed.

For some years prior to the occurrence giving rise to this suit plaintiff and defendant had been intimate friends. In January, 1930, plaintiff was working for the Barts Fur Company in a position obtained for him by defendant some time before. Defendant was engaged in the business of broadcasting advertising over the radio; he had bought from a broadcasting station the right to broadcast for one hour, paying \$100 a week for this; he then would retail this time to business concerns with whom he had contracts. Plaintiff and defendant met frequently during the summer of 1930 and defendant told plaintiff that his business was "going over big," that he had a number of contracts with retailers for broadcasting service; plaintiff says that defendant never told him in dollars and cents how much he was making, but only said he was making "a lot of money."

About the middle of September, 1930, plaintiff was discharged from his job with the Barts Fur company; plaintiff and defendant then discussed the matter of plaintiff coming in with the defendant in his broadcasting business. Defendant at this time had put into the busi-



ness about \$3,000. The business in the spring months of 1930 with the possible exception of March showed a loss, but in September business improved, showing a substantial gain; defendant told plaintiff that the prospects for business were promising; plaintiff invested \$1,000 and a written agreement dated September 29, 1930, was signed by both parties, and purported to confirm the arrangements made concerning the plaintiff's interest and connection with defendant's business. The writing recited that in consideration of the \$1,000 paid by plaintiff he was to receive a certain amount of the stock of defendant's business "when incorporated," and starting October 6th for a period of six months, a salary of \$50 a week for services in promoting and assisting to develop the business, and at the end of six months 20 per cent of the net profits of the business.

The writing also contained the following:

"It is further agreed between us that at the expiration of the six months, if for any reason you are not satisfied with this business connection and you wish to withdraw, you are to receive the return of the \$1,000 in full and 6% interest - and you in turn are to surrender all stock and interest in the Illinois corporation of the National Shoppers Club."

At the same time defendant gave plaintiff his note payable to the order of plaintiff six months after date for \$1,000, to which was attached the power of attorney to or for judgment. After plaintiff put in his money the defendant put an additional amount of \$200 into the business.

While the income was substantial in September and October, it fell off in December and the business was closed in January, 1931.

Plaintiff was an experienced business man at the time of the agreement, having been in business about twenty-seven years.

"In order to maintain an action for fraud and deceit the evidence in the case must show:

1. That the representations as charged in the declaration were made by the defendants, or one of them.
2. That the representations were false and known to be false by the defendant making them, or made as a positive assertion reck-





lessly without any knowledge of its truth, and such representations must be made to deceive the plaintiff.

3. That the plaintiff believed the representations to be true.

4. That the plaintiff, in the purchase or entering into the contract relied upon the representations and was induced to make the purchase or enter into the contract because of the same.

5. That the plaintiff has suffered damage thereby."

Billstrom v. The Triple Head Tire Co., 230 Ill. App. 586. See also Press v. Blair, 133 Ill. App. 523.

The evidence clearly shows that defendant's statements to plaintiff were merely expressive of his hopes and anticipations. Most of the statements were made in conversations during the summer of 1930 while plaintiff was employed as manager of the Berta Kur company, and did not relate to any investment by plaintiff in defendant's business. They were not made with the intention of deceiving plaintiff into investing with defendant, for plaintiff at this time was employed elsewhere. It was only after plaintiff had lost his job, about the middle of September, that any investment by him was considered. At this time business was promising. Defendant had a number of contracts with retailers and evidently had an honest belief that the business would make money in the future. His additional investment of \$200 shows this. No statements of any material facts were made to plaintiff, but only, in general terms, of the prospects.

Plaintiff argues that the representation that defendant was making "a lot of money" and that the business was "going over big" are representations of material facts, which defendant knew were false. We do not agree with this. The terms "a lot of money" and "going over big" are relative and not statements of any precise facts. Moreover, from the business transacted during the months of September and October defendant might be justified in claiming, he was making money and that the business was going over big.

It is also a rule in such cases that one who has been defrauded must, at the earliest possible opportunity after the



discovery of the fraud, ask to have the transaction rescinded and the parties placed in status quo. Plaintiff testified that he asked the defendant to return the \$1,000, but there is no evidence that he ever offered to return the note of defendant which was given at the same time.

The written agreement provides for the contingency of dissatisfaction of plaintiff with the enterprise. There is an explicit agreement that if he is dissatisfied at the expiration of six months he is to receive the return of his \$1,000 with interest, and defendant gave plaintiff his note for this amount. This agreement, together with all the other circumstances in evidence, wholly negatives any claim based on fraud and deceit.

Upon the record before us it is the duty of this court to reverse the judgment with a finding of fact, without remanding, which is accordingly done.

REVERSED WITH FINDING OF FACT,  
WITHOUT REMANDING.

O'Connor, P. J., and Metchett, J., concur.

#### FINDING OF FACT.

We find that the evidence fails to show that defendant was guilty of any fraud or deceit which induced the plaintiff to make an investment in defendant's business.



37458

SERA CHROME PLATING COMPANY,  
Appellee.

vs.

J. A. DUBOW MANUFACTURING CO.,  
Appellant.

APPEAL FROM DECISION OF THE  
COURT OF CHICAGO.

276 I.A. 602<sup>4</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover payment for services rendered to defendant in plating the shafts of a considerable number of golf clubs. Upon trial by the court judgment was against defendant for \$774.43, from which it appeals.

The principal point in controversy is concerned with the plating kind of plaintiff had agreed to apply on the shafts of the golf clubs. There seems to be two types of plating, one called by the witnesses a straight chromium plate job in which the chromium is laid directly upon the metal shaft. There is also a copper nickel plating job in which there is a copper or nickel base applied over the metal shaft and chromium is laid on over this base. While the shafts treated by either method have about the same appearance, shafts treated with a straight chromium plate do not wear well, the chromium coming off by corrosion, while with the latter process the chromium plate is durable, and, as witnesses say, "it stands up." Plaintiff says it contracted to give defendant a straight chromium plate. Defendant asserts that it was to receive a chromium plate over a copper or nickel base.

Joseph Seranella, an officer of the plaintiff corporation, testified that he had an interview in March, 1931, with Andrew Robertson who represented the defendant, which had a lot of golf club metal shafts to be chromium plated; that upon Robertson asking how much it would cost, Seranella told him it would be 12¢ apiece; that Robertson said this was too high and showed the witness a



shaft he said he could get plated for 7¢ apiece; the witness told Robertson that this specimen shaft was not a copper nickel plate job, just a straight chromium plate, and Robertson said this was good enough for their purposes, and plaintiff then offered to do the work for seven cents apiece, straight chromium. Joseph Seranella's version of the agreement was supported by the testimony of his brother who was present at the time of the conversation with Robertson. Plaintiff thereafter received quantities of shafts and plated them and returned them to defendant. This work in April totaled over \$400, in May over \$500, from May 25th to June 6th nearly \$300 - all of which was paid by defendant without complaint. In the latter part of June defendant complained of 318 shafts, and plaintiff replated them without charge.

Robertson says that he told Seranella that defendant had some chromium plating work to be done on golf shafts and Seranella took some shafts away and submitted sample shafts he had plated. Robertson says nothing was said about the nature of the work; that the shafts plaintiff had plated looked good - just as good as a sample Robertson had given Seranella; Robertson said there would be five to ten thousand shafts to be plated and Seranella said he would do them at seven cents apiece if he would give him that amount of shafts; Robertson says the sample he gave Seranella had a copper base under the chromium, and that nothing was said to Seranella about omitting this base.

The trial court saw and heard the witnesses testifying and was much better able to judge as to the credibility of the variant stories than we are. The fact that large numbers of shafts were plated and were paid for by defendant without complaint tends to support plaintiff's version of the transaction.

Robertson testified that he had twenty-five years experience as a golf professional and was familiar with the manufacture of golf

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clubs with steel shafts. It is highly improbable that he would accept the large number of shafts plated by plaintiff if the work was not done according to agreement. We find no complaint made except about the particular batch plated under the order of June 22nd, which plaintiff made good.

The record also shows that a number of the golf club shafts were introduced in evidence for the inspection of the court. They have not been brought to this court as exhibits. We will therefore assume that an inspection of them would tend to support the trial court's conclusion.

In June, 1931, defendant gave its check for \$434.43 in payment of a job for shaft plating; the check was not paid by the bank upon which it was drawn. The court included this amount in its judgment. Defendant argues that non-payment was caused by the unreasonable delay and negligence of plaintiff in handling the check, and therefore plaintiff was not entitled to judgment for the amount of the check.

We are of the opinion that the court properly held that the facts failed to show any delay or negligence on the part of plaintiff. The check was drawn by defendant on Friday, June 5, 1931, and mailed to plaintiff either on that date or the following day; plaintiff received the check in the mail on Monday, June 8th, and deposited it the following day in the Foreman bank, in which plaintiff kept its checking account; the check was presented through the clearing house by the drawee to the Noel State Bank on June 10th, which bank refused payment, attaching a slip to the check saying, "Returned by Noel State Bank, Endorsement Official"; the Foreman Bank mailed the check to the plaintiff, which received it June 12th; on this day Joseph Seranella, president of the plaintiff corporation, telephoned the defendant and spoke to a Mr. Hejns, the auditor and an officer of defendant, informing him that payment on the check had been refused by the Noel State Bank; the defendant



was requested to give plaintiff another check or to obtain payment of the check in question, and Ceranella was informed that Mr. Dubow, the president of the defendant corporation, was in New York and would not be back for a week, and that he, Mr. Nejma, could not do anything regarding the check in the absence of Mr. Dubow. The Koel State Bank, upon which the check was drawn, closed its doors on June 18th, so that the defendant had notice six days before the closing that payment of the check had been refused and was requested to take steps to protect its account with the bank or obtain for plaintiff the moneys represented by the check.

Section 185 of the Illinois Negotiable Instruments Law, chapter 98, (Cahill) provides that unless a check is presented for payment within a reasonable time after its issue, and notice of dishonor is given to the drawer, the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. The facts in the instant case clearly show that plaintiff did all that was required of it to secure payment of the check, and that it was presented within a reasonable time.

There is no allegation in defendant's affidavit of merits, nor any proof, that it suffered any loss by the alleged delay of the plaintiff in handling the check. In many cases it is held that the burden is on the defendant to show that he has suffered loss by such failure. Brannen on Neg. Inst., p. 1046, and cases there cited. Daniels on Neg. Inst., 8th ed., sec. 588, is to the same effect.

The check was made payable to the order of "Sera-Chrome"; the plaintiff's corporate name is "Sera Chrome Plating Co."; the check was endorsed by plaintiff, "Sera Chrome Co.," and also with the proper name of the plaintiff, "Sera Chrome Plating Co." It is in evidence that other checks endorsed in the same way had been paid by the Koel State Bank, and there was no sufficient reason why it should not have paid this check. There was no negligence in this respect on the part of the plaintiff.

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FIG 2

We are of the opinion that the trial court was justified, upon the evidence presented, in entering judgment against the defendant and it is therefore affirmed.

AFFIRMED.

O'Connor, C. J., and Latchett, J., concur.



36520

CHICAGO CITY BANK AND TRUST COMPANY,  
a Corporation, Conservator of the  
Estate of Rose Bush, Insane,  
Appellee,

vs.

WILLIAM KAUFMAN and SOPHIA KAUFMAN,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

276 I.A. 603<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

September 15, 1932, the conservator caused a judgment by confession to be entered against defendants for \$17,103.75, which included \$1500 allowed by the court under the provision of the power of attorney by which the makers agreed to pay 10 per cent attorneys' fees. An execution issued on the judgment September 27th and was returned served on both defendants on December 20th. November 10, 1932, defendants moved to vacate the judgment. This motion was denied December 10th thereafter, and from the order denying that motion this appeal has been perfected.

In their affidavit filed in support of the motion defendants set up that they first obtained knowledge of the entry of the judgment October 27th when the execution was served, and aver that they believe they have a good defense upon the merits to the whole of plaintiff's demand: (1) in that the note upon which judgment was entered was secured by a trust deed against certain real estate, and that this trust deed had been foreclosed and the indebtedness represented by the note was thereby merged in the decree, the decree being in force and not having been reversed, set aside or modified; (2) in that no right, power or authority from the Probate court of Cook county, Illinois, was granted to plaintiff to cause judgment to be entered on the note; and (3) in that the judgment as entered contained an exorbitant and excessive allowance for attorneys' fees. Also (although the point was not stated in the affidavit filed) it is urged that the record lacks an essential element, namely, an

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affidavit of the amount due.

To the proposition that extrinsic proof is not admissible to support a judgment by confession and that all facts must appear from the documents, records and papers filed, defendants cite Little v. Dyer, 138 Ill. 272, and Weber v. Powers, 213 Ill. 370. We do not understand that there is any controversy on this proposition. The law applicable to motions of this kind is well established. It is essential that an affidavit in support of a motion to set aside a judgment by confession state facts which constitute meritorious defense. Mandel Bros. v. Cohen, 248 Ill. App. 188. The affidavit is, of course, construed against the party making it. An affidavit by plaintiff of the amount due does not seem indispensable to the validity of such a judgment.

In the case of Rising v. Brainard, 36 Ill. 79, it was held that the Supreme court would not reverse a judgment entered by confession on the sole ground that no affidavit was filed showing that defendant was alive and that the debt was due and unpaid. In the later case of Hempstead v. Humphrey, 38 Ill. 90, the opinion of the court points out that a different rule had been announced in the case of Hinds v. Hopkins, 28 Ill. 350, but that in Rising v. Brainard, a later case, after more mature reflection the court "became satisfied that the practice was not properly stated in the case of Hinds v. Hopkins," and said: "It was there held that in addition to the want of such an affidavit or order of a judge, it must appear that the defendant has a legal or equitable defense. It was said that 'this court will not reverse a judgment on the sole ground that no affidavit was filed showing the defendant was alive, and that the debt was due.'" In the later case of Farwell v. Huston, 151 Ill. 239, the Supreme court stated that such relief would not be granted "if it appears that the debtor owes the amount of the judgment and has no defense either legally or equitably to the debt for which the judgment



is rendered."

An examination of the record here discloses an affidavit attached to the narr. and cognovit made by P. J. Gerard, who swears that he is the duly authorized agent of plaintiff; that he is acquainted with the handwriting of defendants and that they are still living. The contention on this point is therefore without merit.

The contention of defendants that the conservator had no right to institute the proceedings without permission from the Probate court of Cook county is also without merit. Section 11 of chapter 36 of the statutes (Cahill's Ill. Rev. Stats. 1933, chap. 36, sec. 11) provides in substance that the conservator shall settle all accounts of his ward and demand and sue for and receive in his own name, as conservator, all personal property, etc. This section thus permits the conservator to sue at law without any order directing him to do so.

In Burton v. Estate of McGerver, 202 Ill. App. 606, the Appellate court, construing section 5 of chapter 22 of Illinois Revised Statutes, holds that under that statute a conservator has a right to bring suits in chancery in good faith to protect the rights of his ward; that the statute itself is sufficient to give such authority to bring the suit, and that it is not necessary for the conservator to first obtain an order of record in the Probate court before bringing the same. It would therefore appear that neither in law nor in chancery is such an order indispensable. This contention of defendants therefore cannot be sustained.

It is urged that the note upon which judgment was entered was secured by a trust deed which has been foreclosed and that the indebtedness has therefore been merged in the decree entered in the foreclosure proceedings and that for that reason the suit can not be maintained. Defendants, we think, misapprehend the law in this respect. In Rohrer v. Deatherage, 336 Ill. 450, the Supreme



court discussed the rights of a mortgagee upon default, saying:

"In such case the mortgagee has several remedies which he may pursue to enforce the payment of his debt. He may sue the mortgagor in assumpsit for a judgment upon the personal obligation; he may sue in equity for the foreclosure of the mortgage; or he may recover the possession of the mortgaged property by an action of ejectment. These remedies are concurrent or successive, as the mortgagee may deem proper, and he may pursue any two or all three of the remedies simultaneously."

The holder of such indebtedness would, of course, be entitled to only one satisfaction. This affidavit does not state that any sale has been had under the decree of foreclosure. Such a sale when made would satisfy the debt to the amount for which the property was sold, less costs and expenses, and presumably the holder of the indebtedness would be entitled to judgment for any deficiency. The affidavit here does not aver that any such deficiency judgment has been entered.

This court has considered the nature of a foreclosure decree in Hughes v. Hoerich, 269 Ill. App. 158, and held that such a decree is in the nature of a decree in rem rather than in personam, and that it does not create a lien upon other premises of the mortgagor superior to that of judgment creditors who obtained their judgment before the decree for deficiency was entered. We held that the affidavit does not state a meritorious defense in this respect.

We are of the opinion, however, that the allowance of \$1500 for attorneys' fees as a part of the judgment was unreasonable. True, the affidavit in this respect is not as full and complete as it should be, and although it avers that the fees allowed are excessive and exorbitant, it contains no suggestion as to what the usual and customary fee should be. Nevertheless, the Judges of this court may not pretend ignorance in this respect. The services performed by the attorneys for plaintiff are indicated by the record, and we know the time which would necessarily be consumed in procuring the judgment. We also know the amount involved and are of the opinion and find that the sum of \$250 would be a reasonable fee and the



amount usually paid in Chicago, Cook county, Illinois, for services performed by the attorneys for plaintiff. We assume that reasonable compensation would be allowed to attorneys for plaintiff in the foreclosure proceeding. The amount of \$1500 thus being unreasonable and excessive to the amount of \$1250, if plaintiff, within twenty days from the filing of this opinion, will enter a remittitur in this court for said amount of \$1250, the judgment will be affirmed; otherwise it will be reversed and the case remanded.

AFFIRMED UPON REMITTITUR;  
OTHERWISE REVERSED AND REMAN ED.

O'Connor, P.J., and McSurely, J., concur.

On motion of appellee to modify the opinion with respect to the amount allowed for attorneys' fees by increasing the amount, it is ordered that the attorneys' fees mentioned in the foregoing opinion be increased from \$250 to \$500, and the opinion is hereby modified accordingly. Upon filing a remittitur in accordance with this modification, the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

[illegible]



37046

FRANK B. SCHOLL,  
Appellee,

vs.

G. A. ACKERMAN PRINTING CO., Inc.,  
a Corporation,  
Appellant.

A FINAL DECISION COURT  
OF COOK COUNTY.

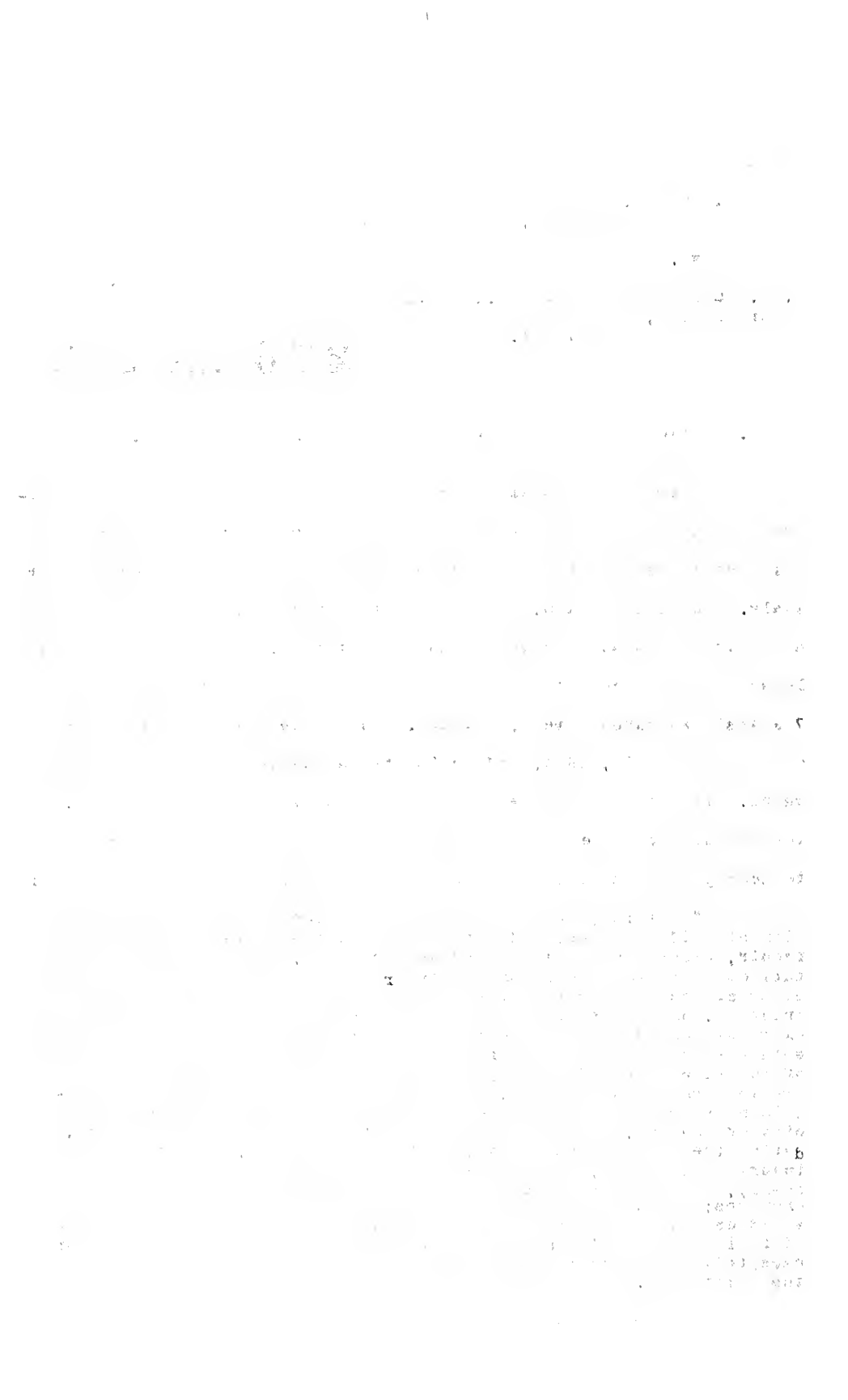
276 I.A. 6032

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Printing company from a judgment in the sum of \$4500 entered upon the finding of the court. The suit was in assumpsit on a lease executed by the parties under their seals. The declaration, which was filed April 29, 1932, consisted of a special count and the common counts attached. By the terms of the lease plaintiff demised to defendant the premises known as 737 to 739 West Van Buren street, Chicago. The lease was executed on or about December 12, 1924, and by its terms was for a period of three years. It was afterward extended so as to expire April 30, 1931. The declaration alleged damage by reason of the failure of defendant to comply with the second clause of the lease, which was as follows:

"That it (the defendant) has examined and knows the condition of said premises, and has received the same in good order and repair, except as herein otherwise specified, and that no representations as to the condition or repair thereof, have been made by the party of the first part, (the plaintiff) or the agent of said party, prior to, or at the execution of this lease; that are not herein expressed or endorsed hereon; and that it (the defendant) will keep said premises in good repair, replacing all broken glass with glass of the same size and quality as that broken; and will keep said premises and appurtenances, including catch basins, vaults and adjoining alleys, in a clean and healthy condition, according to the city ordinances, and the direction of the proper public officers, during the term of this lease, at its own expense, and will without injury to the roof, remove the snow and ice from the same when necessary, and clean the snow and ice from sidewalks in front of said premises; and upon the termination of this lease in any way, will yield up said premises to said party of the first part (the plaintiff) in good condition and repair (loss by fire and ordinary wear excepted) and deliver the keys at the office of the said party of the first part."

The declaration alleges that defendant failed to deliver the



premises in the condition required by paragraph 2; that contrary to the terms of the lease defendant permitted the beams and posts on certain floors and the sub-floor to be eaten by acid and damaged thereby, so that they would have to be replaced; permitted the plaster on the second floor to be broken, damaged and torn out; permitted parts of the floors on the second, third, fourth, fifth and sixth floors of the building to be damaged by heavy trucking across the same; placed on the first floor certain partitions and concrete floors over wood floors, and failed to remove the same and replace the damaged floors; permitted the windows on several of the floors of the building to become broken; damaged the walls and ceilings of the building by using certain coating or whitening material; permitted the tank and trestle to become in bad condition and repair, the plumbing to be torn out, the stools and wash basins to be removed; permitted or caused the electric wiring and fixtures to be torn out and damaged; permitted the freight elevator to be damaged by overloading, the rear door to be damaged and certain brick and steel plates to be removed; permitted certain metal frames on the sixth floor to be eaten and destroyed by acid kept on the window sills on the second floor of the building; that none of these damaged parts of the building were repaired or restored as required by the lease.

Defendant pleaded the general issue.

The evidence shows that plaintiff is the owner of the leasehold, not the fee, of the premises; that he purchased the leasehold in 1923; that at that time the defendant Printing company occupied the premises under a lease from plaintiff's vendor. The building is six stories high and immediately adjoins another building owned by defendant. The two buildings were used in conjunction with each other as a single unit. The leased building was not new. It was apparently about 28 years old. It was 50 by 100 feet in size. The lease provided it should be used to conduct a printing business.

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1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps them to understand the present and the future.

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1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $t \rightarrow \infty$ . It is shown that the solutions of the system (1) tend to zero as  $t \rightarrow \infty$  if and only if the matrix  $A$  is Hurwitz stable. This result is proved by the method of the variation of constants.

Upon the hearing plaintiff testified as to the state of repair for some time before and at the time of the surrender of the premises and produced the testimony of an electrical engineer, Mr. Walcott, a general contractor, Mr. Crimp, and an architect, Mr. Meneses, who gave evidence in detail as to the condition of the building with reference to repairs and the amount of money necessary in order to put the building in a condition which would make it desirable for another tenant for business purposes. The testimony of the general contractor was to the effect that such repairs would cost reasonably \$8200, and as we understand the record, defendant does not contend that if it is in fact liable therefor, these charges would be unreasonable. Experts also testified for defendant to the effect that some of the repairs demanded were not reasonable or necessary, and upon stipulation of the parties the trial court, with the parties interested, visited the premises and made an inspection. His opinion as to the condition of the premises appears from the finding which almost cut in two the demands of plaintiff.

Defendant does not contend that the rotting parts of the building caused by acid was not an extraordinary use of the building for which defendant is liable under the second clause of the lease, but it says: "As to the other items of damage, that is, damage to the floors by reason of trucking, damage to the elevators, plaster, partitions, windows, etc., the ordinary character of the wear cannot be established without reference to the specific use to which the property was put. Therefore, plaintiff has utterly failed to show by his evidence that the condition of the building was caused by anything except ordinary wear, and the finding of fact is manifestly against the weight of the evidence." In its reply brief defendant explains that the authorities cited by plaintiff might be admitted without doing any injury to its case,



and that its contention is, "That is or is not ordinary wear can only be determined by a reference to the character and condition of the premises and the normal use to which the premises were to be put." If we understand the contention of defendant, it is that it was necessary in order that plaintiff recover that he show the condition of the premises at the beginning of the term and the manner of the use of same during the term, so as to furnish the trial court with a basis of comparison between the state of the premises at the inception of the term and their state at the end of it, and that the amount of damages could not be ascertained in the absence of such evidence; in other words, that the burden of proof in this respect was on plaintiff.

By the second clause of the lease it was expressly agreed between the parties that defendant had examined and knew the condition of the premises and that it had received the same in good order and repair, except as otherwise specified, and no exceptions, it seems, appear upon the lease. The lessee covenanted that it would keep the premises in good repair. We are disposed to hold that under these provisions of this clause of the lease it was sufficient for plaintiff to show the age of the building, the use to which it was to be put, and the condition in which it was returned. The agreement of the parties was sufficient prima facie to show the actual condition of the premises at the beginning of the lease. Plaintiff assumed the burden of showing what repairs were necessary and that the necessity was not caused by ordinary wear.

The cases upon which defendant relies are quite distinguishable (all of them as to the stipulations of the particular covenants) and most of them as to the particular facts. It would serve no useful purpose to review these authorities at length. The brief of defendant does not discuss the question of its liability as to separate and particular items. The record as made up does not disclose which

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items claimed by plaintiff were allowed and which disallowed to the court. The finding is general and leaves us wholly in the dark as to the views of the court on particular items. No findings of fact nor propositions of law were submitted by defendant. On the contrary defendant seems to rely wholly on the theory that the burden of proof was upon plaintiff as to each and every item to produce evidence as to the actual condition of the premises at the time of the extension of the lease.

There is evidence in the record which shows the age, the location of the building, the nature of the use for which it was suitable, and its condition in detail after defendant's occupancy. The covenant in the lease recited that defendant after examination received the premises "in good order and repair." There is also proof of the necessary and reasonable cost of restoring the premises to that condition. We hold this was sufficient to raise issues of fact as to each item. Defendant was, of course, not obligated to build a new building nor to erect a building suitable for other than business purposes. As in nearly all similar cases, the issues are resolved into questions of fact. Kagan v. Gillett, 269 Ill. App. 311. The trial Judge saw the witnesses. By agreement of the parties he personally examined the premises. His findings are entitled in this court to the same weight as the verdict of a jury.

While it is not possible to review the cases in detail, it may be remarked that Cannell v. Brownstein-Louis Co., 86 Cal. App. 610, 261 Pac. 331, is a case where more nearly than any other cited, the covenant was similar to the one upon which this suit is based. The tenant there was found to be obligated to make repairs such as were proved here. In Harris v. Brothers, 236 Ill. App. 41, plaintiff sued the tenant for making unauthorized alterations in the building and for using the premises for unauthorized purposes. The court after a careful consideration of all the cases announced



the rule followed in this case by the trial court for the estimation of damages, namely, the reasonable cost of making <sup>necessary</sup> the repairs.

The ultimate issues here were issues of fact, and upon the record presented we must regard these issues as settled by the finding of the court.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McDermott, J., concur.



37102

JOSEPH L.A. ROSSA,  
Appellee,

vs.

NATIONAL FIRE INSURANCE COMPANY  
OF HARTFORD, CONNECTICUT, a  
Corporation,  
(Appellant.)

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

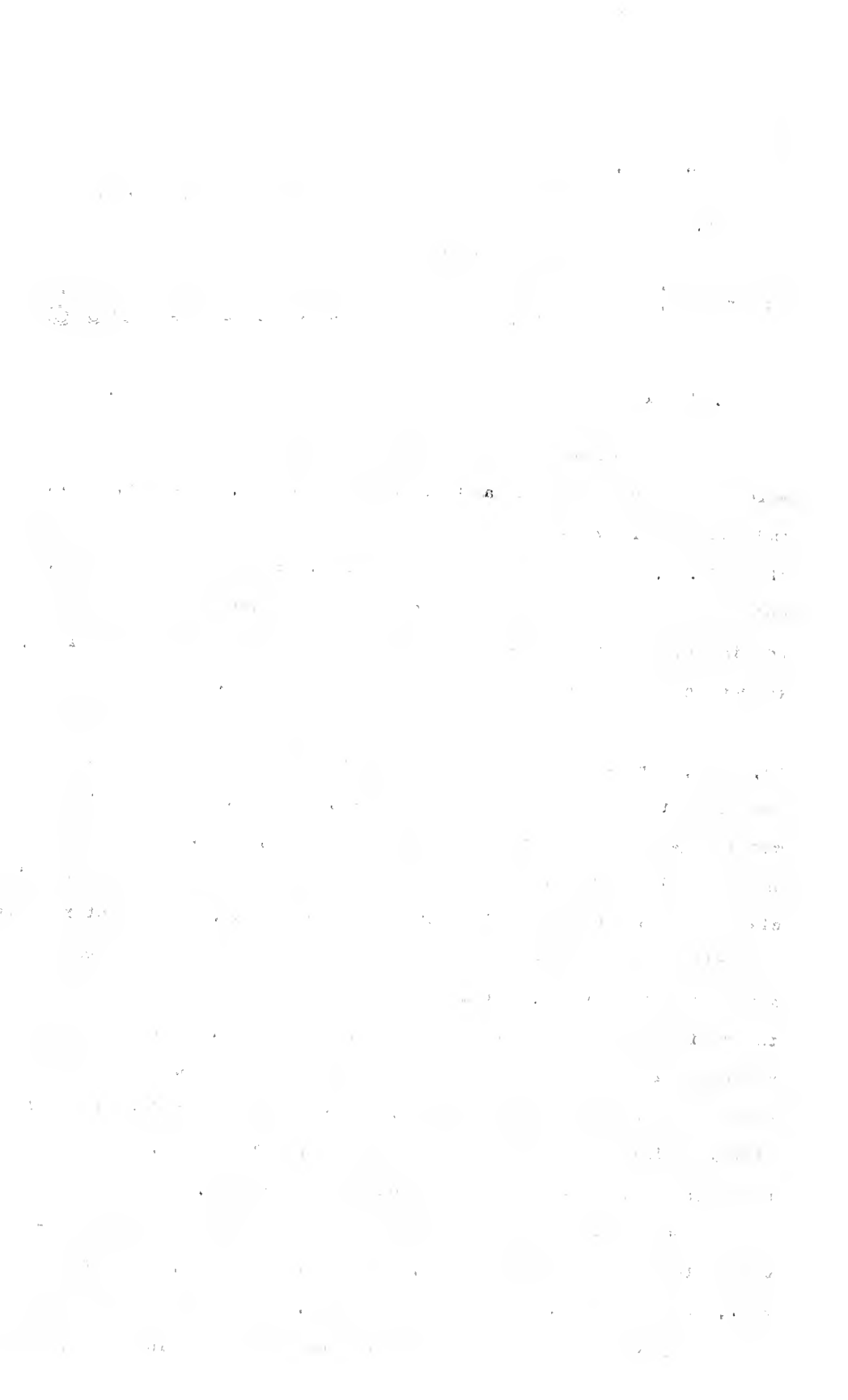
276 I.A. 603<sup>3</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon contract on a fire insurance policy for alleged damage by fire to a stock of merchandise, fixtures, etc., and upon trial by jury there was a verdict for plaintiff in the sum of \$1775.82. The court required a remittitur in the sum of \$575.82 and upon entry of it overruled defendant's motions for a new trial and in arrest and entered judgment in favor of plaintiff for \$1200, to reverse which defendant prosecutes this appeal.

The policy upon which plaintiff sued was issued November 24, 1930, for \$3500 and covered a fruit store conducted on the premises at 5654½ Irving Park boulevard, Chicago. The property was damaged by fire which occurred December 2, 1930. The premium on the policy was paid and plaintiff submitted proofs of loss within sixty days as required by the terms of the policy. Defendant resists payment upon the ground that plaintiff was not the unconditional owner of the property. It is also insisted that notwithstanding the remittitur required the damages are excessive. It is earnestly contended in behalf of defendant that in regard to both the liability and the amount of damages allowed, the verdict of the jury is manifestly against the weight of the evidence, and this is, we think, the controlling question to be decided in the case.

On the issue of ownership, plaintiff claimed that he purchased the stock of merchandise, fixtures, equipment, business, etc., from Edward J. Frankland October 30, 1930. His testimony is to the effect that he was a fruit peddler prior to this transaction



and that he also conducted a fruit store at 5750 Wentworth Avenue for eight years. He says that there was not much in the Irving Park store when he bought it, "a little groceries and a little fruit, not much." He says he found out the business was for sale in South Water street, went out to see Mr. Frankland and made a deal with him; that Frankland was not personally to get a cent for the store; the purchase price was to be paid to his creditors, and on direct examination plaintiff testified that he paid \$558 to these creditors for the store; that \$300 of the amount was paid to Sam Spicuzza; that other creditors of Frankland were paid small amounts, \$4, \$8, \$10, \$15. He says that he did not get a bill of sale, but he produced a receipt from Spicuzza, dated November 13, 1930, which acknowledged payment of \$300, as the writing says, "in payment of Mr. E. Frankland store." Another receipt from Spicuzza dated November 11, 1930, for \$25, is in evidence.

Plaintiff also says that after purchasing this store he left his clerks in charge of his other store at 5720 Wentworth Avenue for a couple of days, then closed that store, moved his fixtures, groceries and fruit from Wentworth Avenue to the Irving Park store. The business at the Irving Park store was conducted under the name of Blue Goose Fruit Market. Plaintiff also testified that he closed the deal with Frankland October 30th at the store; that he called up all the creditors; that at that time he had a list of the creditors which, however, was burned <sup>up</sup> in the fire. Creditors, other than Spicuzza, he says, were Frank McVeagh, Brown Candy Company and Bowman Dairy. He says he took receipts from the other creditors and hung them on the file; that these too were burned up in the fire.

In addition to the creditors, plaintiff says, Mr. Raimondi, a lawyer, and Salvatore Nicosia were present when the deal was closed. Plaintiff says he had known Mr. Nicosia from April 19, 1930. He was at that time very much interested in Miss Theresa





Nicosia, daughter of Salvatore, but said he did not remember whether he ever discussed the purchase of the store with the father and the daughter. The court sustained an objection to the question as to whether he frequently visited at their home. It appears, however, from other evidence that this was the case. Plaintiff says that he did not know that a bill of sale was executed by Frankland conveying the store to Theresa Nicosia.

Plaintiff says that Frankland was present when the deal was closed and was represented by attorney Biagi Raimondi, who was also present; that Nicosia came over with the landlord, Muscio; that Frankland orally agreed not to go into business anywhere around the store. Plaintiff explains the presence of Nicosia by the fact, as he says, that he was "supposed to be my intended father-in-law, and he came over."

As against this evidence Frankland, the owner who conveyed the property, testifies that he sold the store to Theresa Nicosia; that he did not know plaintiff at all at that time; that he talked about the matter only with Theresa and her attorney. He is corroborated by a bill of sale in evidence which he identified as the one he executed on that date conveying the business to Theresa Nicosia. The writing is under seal and appears to have been acknowledged by the grantor before Biagi Raimondi, a notary public. An affidavit of Frankland, which the evidence tends to show was executed and delivered at the same time, is to the effect that all bills were paid and that the affidavit was made for the purpose of inducing Theresa Nicosia to purchase the store. This document also appears to have been executed before the same notary public at the same time.

Frankland says that when the deal was closed Nicosia was there but his daughter was not; that he did not see plaintiff but would not say positively that he was not there. Plaintiff, the witness said, did not pay the creditors. That was all handled by



the attorney for the buyer. The witness did not get any money. His creditors were all there. He owed them in the aggregate \$1450, and he gave a list of these creditors to Raimondi.

Salvatore Nicosia testified that he bought the store for his daughter Theresa; that he employed in her behalf the lawyer, Raimondi; that he received the bill of sale for her and paid in cash \$555, of which amount his daughter Theresa furnished \$300. Nicosia said he made plaintiff the manager of the business and that he figured on paying him a commission but had not come to any agreement with him; that Spicuzza was there and the attorney paid him \$46 on his bill, taking a receipt; that Spicuzza then had \$300 more coming and that about a week thereafter he, (Nicosia) gave plaintiff that sum and directed him to make payment to Spicuzza, which he trusted him to do. Neither Nicosia nor his daughter had ever run a store. She was a clerk in a store in Oak Park and her father a painter. Nicosia says that between October 30th and December 2nd he gave plaintiff \$100 with which to buy goods for the store. It also appears that a son of Nicosia worked for plaintiff at his Westworth avenue store.

Anthony E. Kuccio, the landlord, testified that he never rented the store to plaintiff; that after the sale he rented the place to Theresa and that her father paid the rent. The lease was verbal. He says that plaintiff never paid any rent; that he was present October 30th/<sup>but</sup> did not recall that plaintiff was there, and that he gave receipts for the rent when it was collected. He saw plaintiff in the store after November 1st. He was very friendly to the Nicosia family; Theresa Nicosia was a godchild of his wife.

Biagi Raimondi, a lawyer, testified that he knew all the parties and met plaintiff first at the home of Nicosia; that he represented Theresa Nicosia in the purchase of the store; that the creditors presented their bills and were paid; that plaintiff was



there but did not say anything. Raimondi testified that he drew up a bill of sale and an affidavit, and he produced the same at the trial; that he talked with plaintiff and told him that the title was being taken in the name of Theresa, "whose money it actually was." He said he paid all the creditors except Spicuzza October 30th; that plaintiff paid him no money and he gave plaintiff no money; that he, witness, told Spicuzza, who was his friend, that he would pay him later at his place of business. Later, he understood, Nicosia was to pay Spicuzza. The witness was paid a fee by Miss Nicosia and was of course friendly to her. At the time the deal was made Miss Nicosia paid \$25 to Frankland, which was turned over by Frankland to the witness at the time the deal was closed.

It appears from the cross examinations of plaintiff and Miss Nicosia that they were on very friendly terms, although she denies the engagement to marry, which he asserts. Plaintiff says he had been visiting at the Nicosia home every evening almost since the first time he went out there, about May 24, 1930; that he told her he was going to buy the store about three weeks before he did so; that she told her father, who later asked him, and plaintiff replied "Yes" because he had been held up on the South side about three times in a month and figured he wanted to move to the North side. He says that he had even bought a ring and wrist watch about three months before he purchased the store; that he did not have a quarrel with Theresa or her father before he bought the store but did have one Thanksgiving day afterward. The witnesses who knew seem to agree that the visits of plaintiff to the Nicosia home ended about that time. It is certain that almost immediately thereafter Theresa, as well as plaintiff, each took out in their respective names fire insurance on this store.

We think an overwhelming preponderance of the evidence indicates that the store was purchased in the name of Theresa, and



that it was the intention of all the parties that she should be the owner. The testimony of the landlord, the owner who sold, the attorney who looked after the matter, as well as the testimony of Nicosia and his daughter are to that effect. As against these facts and circumstances, the slightly corroborated testimony of plaintiff cannot prevail. The evidence, of course, does indicate that the property he moved from his store on Wentworth Avenue to this new store belonged exclusively to him, and if there was evidence in the record from which we could determine the indemnity due to him under the policy on account of this property, we would not hesitate to hold that he was entitled to judgment for that amount. There is no such evidence in the record, and for the reason that the verdict of the jury and the judgment entered are against the manifest preponderance of the evidence, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McGuire, J., concur.





37372

JOSEPH LUKIS,  
Appellee,

vs.

BRUNO H. DRAKE and CICCRO  
STATE BANK,  
Defendants.

JAMES L. CONCORAN, Intervenor.

On Appeal of BRUNO H. DRAKE and  
JAMES L. CONCORAN,  
Appellants.

APPEAL FROM SUP. FOR COURT  
OF COOK CO. TY.

276 I.A. 603<sup>4</sup>

MR. JUSTICE MATHRETT DELIVERED THE OPINION OF THE COURT.

In an action of replevin begun April 1, 1932, by Lukis against Drake and the Cicero State Bank to recover a Buickobile sedan eight-cylinder automobile of the alleged value of \$1000, on May 2, 1932, the sheriff returned the writ "No Property Found." Plaintiff thereupon filed a declaration containing counts both in replevin and in trover. Defendants entered their appearance and filed pleas. An alias replevin writ issued January 31, 1933, which was returned by the sheriff, that he had taken possession of the automobile on January 31st, but that defendant Drake having ~~been~~ given a forthcoming bond for \$1000 according to the provisions of the statute, he, the sheriff, released the possession of the property to defendant.

February 3, 1933, Concoran filed an intervening petition alleging that he was the owner of the property through purchase for a valuable consideration from defendant Drake July 19, 1932, without knowledge of any infirmities in the title; that the automobile was unlawfully taken from his possession January 31, 1933, by the sheriff. Plaintiff filed additional counts. The cause was put at issue and the evidence heard by the jury. At the close of all the evidence the court instructed the jury to find defendant Cicero State Bank not guilty. The motion by defendant Drake for a finding of not



guilty was refused, and the jury returned a verdict to the effect that Drake was guilty and the right of possession of the property was in plaintiff and assessed damages for the detention of the property at \$1,000. Motions for a new trial and in arrest were overruled and judgment was entered on the verdict finding the right of property in plaintiff, assessing plaintiff's damages for an unlawful detention of the property at \$1,000 with costs, and finding that plaintiff have and retain the property replevined and that execution issue. This appeal by Drake and Concoran followed.

It is argued in the first place that the court erred in refusing to grant the motion to direct a verdict for defendants at the close of all the evidence; that at most plaintiff was entitled under the evidence only to a judgment conditioned upon his paying the amount of the indebtedness actually due to defendants; that the court erred in the giving and refusing of instructions and in its ruling in receiving and excluding evidence. The points make necessary a brief review of the facts established by the evidence.

It appears that Lukis is a Lithuanian unskilled in the use of the English language, and with his wife lived at 4631 Harrison street; the wife was also quite illiterate, and it appears that she signed her name by making her mark. Lukis and his wife theretofore had dealings with the Cicero State Bank, of which Drake was assistant cashier. Drake appears to have been well known to Mr. and Mrs. Lukis and was apparently trusted by them.

April 3, 1931, plaintiff and his wife purchased from the Balzekas Motors the automobile which is the subject matter of this controversy. The price of the car with accessories was \$2047.35. Plaintiff was, however, credited for an old automobile as cash in the amount of \$797.35, leaving a balance of \$1250, for which he gave notes, two for \$93.15 each, one for \$493.15, and 13 for \$65 each. At the time of this purchase the vendors gave to plaintiff



and his wife a conditional sales contract which provided that until the automobile was paid for in full the title should remain in the vendors. At the same time the automobile was delivered to the purchasers. The sales contract and the notes were immediately assigned by the vendees to the Mercantile Discount Corporation.

The purchasers seem to have made payments which matured prior to March, 1932, and some of these were made through Drake. March 2, 1932, plaintiff and his wife (who is now deceased) borrowed \$300 from Drake. They executed and delivered to him at that time a note for that amount due three days after date, drawing interest at seven per cent. They also executed and delivered a bill of sale conveying to Drake the automobile as security for the note, and also as further security delivered the physical possession of the automobile to him.

March 9, 1932, defendant Drake, in behalf of plaintiff, paid to the Mercantile Discount Corporation \$63.49 for an installment falling due March 4, 1932. March 25, 1932, Drake took an assignment of the contract and notes held by the Discount company, paying therefor \$317.63 (the full amount thereafter to become due with interest to that date). The testimony of Drake is to the effect that he took this assignment and paid for it only after the Discount company threatened to foreclose on its contract, as by the terms of the contract it might do in case it felt insecure or unsafe. There is some evidence to the contrary, but it is undisputed that on March 25, 1932, defendant did pay that amount for an assignment of the contract.

Plaintiff's testimony is to the effect that on the 4th or 5th of March, 1932, he paid to defendant \$40 to be applied by defendant in payment of the installment of \$63.49. Plaintiff also produced (as corroboration) an undated receipt for \$40 issued by defendant to plaintiff's wife. The receipt is marked, "Rent" and is signed in the name of Cicero State bank, not in that of the defendant personally.



Defendant's testimony is to the effect that this receipt was given to Mrs. Lukis in an entirely different transaction.

March 24, 1932, defendant wrote plaintiff in substance that if he did not call within five days and take care of his note for \$200, also the \$23.40 payment, plus interest paid to the Finance company, "his car would be sold and the money derived from the sale used to pay the indebtedness." Plaintiff testified that the morning following the receipt of this letter he went to see defendant at the bank, taking with him the check of his attorney, Mr. Sherwin, for \$224; that he gave the check to defendant Drake, saying in substance that he wished to get his car; that defendant told him to come the next Monday; that when he went on Monday defendant said he wanted cash; that March 30th plaintiff got a cashier's check for \$224 at another bank and tendered it to defendant, and that defendant told him, "You can't get the car, you pay \$500." Plaintiff also testified that in June or July, 1932, he paid to defendant \$317.63, with which to pay the balance due on account of the Mercantile Discount company; that this was not paid in cash but taken out of the proceeds of the mortgage negotiated on his property for \$1500. Defendant denied this and offered checks, notes, etc., tending to show that the mortgage in question was in fact made in 1931 and not in 1932, and that the proceeds of the loan were used for other purposes in 1931. This evidence was erroneously excluded.

The evidence above recited shows that there were issues of fact which it was necessary be submitted to a jury. A motion was made at the close of all the evidence in behalf of defendant Drake that the jury be instructed "to find the issues for defendant and to find the title to and right to possession of the automobile in defendant Drake." There was a similar motion made in behalf of defendant Corcoran. Both motions were denied. There was no motion, however, by either of the defendants that the jury be instructed to





find for them as to any particular count, and the question as to whether such a motion as to any particular count should have been granted, is not presented to us. It is urged that the general instruction to find for defendant should have been given, and it is contended on the authority of Northern Trust Co. v. Chicago Ry. Co., 318 Ill. 408, that this court should reverse with a finding of facts, because as a matter of law plaintiff failed to produce evidence tending to show a cause of action. We cannot say as a matter of law that there was no evidence in the record from which the jury could return a verdict in favor of plaintiff. The sum and substance of the evidence offered in plaintiff's behalf was that he had purchased this automobile and then had pledged it to defendant for money advanced; that he offered to pay the debt; that defendant refused to accept payment and that he was therefore entitled to possession of the automobile. We do not assume to pass upon the weight of this evidence further than to say that there was some evidence upon which plaintiff was entitled to have his case go to the jury under the law as it has been declared in this State. Libby, McNeill & Libby v. Cook, 232 Ill. 206. This would be true although it might be the duty of the trial court to set aside a verdict for plaintiff.

Defendant further contends that the general instruction in his favor should have been given because, as he says, plaintiff in both counts and in the additional counts of his declaration alleged that he was the owner of the automobile, and defendant pleaded that he and not the plaintiff was the owner, to which plaintiff replied that the property was in plaintiff and not in defendant. Defendant says that there was a total failure of proof of this allegation of ownership; that the fact plaintiff had made some payments on his contract of purchase did not vest him with title to the automobile contrary to the terms of his contract, and that plaintiff therefore failed to prove the case as stated in his declaration.

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To think the evidence offered in behalf of plaintiff as above recited was sufficient in this respect. The case primarily was not one which concerned the title or the kind of title, but particularly the right of possession. Defendant cites Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451, where it was held that a vendor who conveyed to the vendee by a conditional contract had a title sufficient to maintain replevin, and Taher v. O'Connor, 204 Ill. App. 336, where it was held that when such vendor sued in trover defendant was not entitled to offset previous payments made. As the provisions of the contract were apparently mutual, we think these cases must be construed as favorable to the theory of plaintiff rather than that of defendant. Defendant cites Feder v. Highland Casualty Co., 316 Ill. 362, to the point that there was a total failure to prove the case as stated in the declaration. That was a suit on an insurance policy and is easily distinguishable from this case.

The contention of defendant that the court excluded evidence which should have been admitted in his behalf is much more persuasive. As already stated, plaintiff testified that in June or July, 1932, he paid to defendant \$317.63 with which to pay the balance due on the account of the Mercantile Discount company; that this payment was not made in cash but was taken out of the proceeds of a mortgage negotiated on his property for the sum of \$1500. Defendant denied this evidence and offered checks, etc., tending to show that the mortgage loan was in fact made in 1931 and not in 1932, and that the proceeds were used for other and different purposes. We hold that the court erred in excluding this evidence and that it was error for which the judgment must be reversed.

The verdict of the jury indicates a misunderstanding of the issues, arising largely, we think, because the case was tried on two different theories which were entirely inconsistent with



each other. Some of the counts declared in replevin for the goods, others in trover for the conversion of the same goods. Manifestly, plaintiff could not recover the specific goods and at the same time recover the full value for the conversion of the same goods. The form of the verdict and the judgment entered thereon is in replevin, but, apparently, the jury considered the case as one in trover and the brief of plaintiff undertakes to support the judgment entered upon the theory that such is the nature of the cause of action which was tried. The net result is that plaintiff obtained a finding that the property belonged to him and a judgment thereon for the return of it with damages for detention of an amount equal to the full value of the goods as alleged in his affidavit beginning the suit. At the same time, the court excluded important evidence already noticed tending to show that plaintiff had never in fact paid the purchase price of the automobile and was indebted to Drake for it. Plaintiff recovered a judgment for the return of his automobile with the right of action on a bond in the sum of \$1000 in case it was not returned, was allowed to go free of his debt for the purchase price of the automobile, and in addition obtained a personal judgment in his favor for \$1000. Such a judgment cannot, of course, be allowed to stand.

Plaintiff requested the court in this case of simple issues to give 28 instructions, all of which were given, quite sufficient to put the jury in a state of invincible ignorance so far as the law applicable to the subject was concerned. This practice has been often disapproved by courts of review of this State. Adams v. Smith, 58 Ill. 417; Woods v. C. B. & Q. R. R. Co., 306 Ill. 217; Wilmerton v. Sample, 39 Ill. App. 60; Daubach v. Drake Hotel Co., 243 Ill. App. 298; Konczowski v. Boston Store, 263 Ill. App. 88. The attorneys for plaintiff apologize for this large number of instructions and say they will not request this court to review them. We accept the



offer.

This case is a simple one on the law and the facts and should be disposed of without difficulty. Plaintiff under the statute is entitled to a judgment for the return of his goods conditioned upon his paying the amount due defendant. See section 22 of the Replevin act (Cahill's Ill. Rev. Stats. 1933, chap. 119, par. 22). Commercial Credit Trust Co. v. Beck, 261 Ill. App. 436, does not sustain the contention of plaintiff that the statute is not applicable to the facts of this case. On the contrary, the facts there are exactly the reverse of those which here appear.

For the reasons indicated the judgment is reversed and the cause remanded to the trial court.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.





37455

LILLIAN RADTKE,  
Appellee,

vs.

METROPOLITAN LIFE INSURANCE CO.,  
a Corporation,  
Appellant.

APPEAL FROM JUDGMENT  
IN CHICAGO.

276 I.A. 603<sup>5</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant from a judgment in the sum of \$520 entered upon the verdict of a jury directed by the court on motion of plaintiff at the close of all the evidence. The action was based upon an accidental death benefit clause attached to an industrial life insurance policy for \$500 issued to August Radtke, husband of plaintiff, February 15, 1932. This policy was payable to the executor or administrator of the insured, unless payment should be made under the provisions of the succeeding paragraph. This paragraph was to the effect that the company might make any payment or grant any nonforfeiture privilege provided for to the insured, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to the company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial, and further that the production of a receipt signed by either of said persons, or other proof of such payment or grant of such privilege to either of them, should be conclusive evidence that all claims under the policy had been satisfied.

The clause of the policy on which this suit is brought provided that upon receipt of due proof that the insured, after attaining the age of fifteen and prior to the age of seventy, had sustained, after the date of the policy "bodily injuries, solely through external, violent and accidental means, resulting, directly and independently of all other causes, in the death of the insured within



ninety days from the date of such bodily injuries while this Policy is in force, \*\*\* the company will pay in addition to any other sums due under this Policy and subject to the provisions of this Policy an Accidental Death Benefit equal to the face amount of insurance then payable at death."

The proof showed that August Radtke died January 30, 1933, while the policy was in force. Plaintiff, his widow, furnished proofs of death to the defendant company, also produced the proper receipts showing the expenditure by her of \$433.85 in connection with the funeral services of her deceased husband. She thereafter received from the defendant company a check for \$499.34 in payment of the liability of defendant under the life insurance provisions of the policy. Her testimony is to the effect that when she inquired as to the accident benefit she was told by the agent of defendant company, "Well, you get that as soon as the trial is over. You will have to wait until the end of the trial." The trial referred to was apparently of a cause pending in the Criminal court of Cook county, wherein one Taylor was indicted upon the charge of murdering plaintiff's husband. September 28, 1933, plaintiff in a letter apparently by her attorney, requested payment by defendant under the industrial policy, stating that August Radtke was shot by another man so that his death could not possibly be called suicide, and that the branch office had paid \$500 to the widow for life insurance but refused to pay the \$500 due under the double indemnity clause. The letter stated that the man who shot Radtke was tried for murder but "through some good work by his lawyer was not convicted;" however, this did not vary the fact that he died from external violence, and that unless \$500 was paid, Mrs. Radtke would file suit. Defendant replied to this letter to the effect that it had concluded a thorough investigation of the case and the evidence disclosed that the death of the insured was the result of aggression



on his part, which was substantiated by the findings of the court that Taylor was "not guilty" on the grounds of justifiable homicide. The company therefore denied liability for payment of the additional amount. This correspondence was offered in evidence by plaintiff and received without objection.

Upon the trial Mrs. Radtke testified that her husband was shot and died on January 30, 1933, at their home; that she was in the next room when the shooting occurred and the door was closed; that she had gone to work that day about 7:15 in the morning and got home about 5:30 in the evening; that when she got home, Taylor, a Mr. Bray, a Mr. Collins and her husband were all in the living room; that she went into the room and said, "Hello" to them; that Taylor got up and said he was going to the washroom, after her husband had said, "Let's take a walk." She said that Mr. Taylor went out of the room; that her husband went out right after him and that three shots were fired; that she did not see but heard; that she opened the door and went out into the other room and saw her husband leaning against the sink and Taylor "was about the fourth step" and had a gun in his hands; that she tried to help her husband lay down on the floor and he was dead before she knew it. In regard to the insurance she dealt with a Mr. Hiller, an agent of defendant company. She saw him each week as he came to collect and paid him \$5.35 every three months on the policy. She gave the policy to Mr. Hiller in the first week of January, 1933. She also testified to payment of the funeral bill. She had other insurance on her husband's life which the company paid. When the agent gave her the checks, and when she signed the receipt for them, she said to him that she supposed she was to get some more; he replied, "Well, this is all I am taking care of now." Well, I will take care of that later on." She admitted that she had testified in the case in the Criminal court and that she had there said that she came



out of the room, asked what had happened and her husband replied, "Well, he shot me;" that she had been asked how long after the two men went out of the room it was until she heard the shots and that she replied, "Just about two seconds"; that they had just gone out of the room and it seemed that they had just closed the door behind them when she heard the shots, and that she heard three shots.

Charles Crowden testified that he saw the deceased on January 30, 1933, at about 5:15 p. m., at the home of deceased in the company of Taylor; that when he, witness, came to Radtke's home he was in company with Robert Bray; that when he got to the door leading into Radtke's home Radtke invited him in and as he approached the door he noticed to his right that Taylor, an acquaintance of his, was at the table; that Radtke told him (witness) to take off his coat and sit down; that he was there when Mrs. Radtke came home; that she opened the door and came in the doorway; that about that time Radtke said, "Let's take a walk," meaning the four of them who were in the room at the time; that as Radtke started toward the bedroom to get his coat, Taylor got up from his chair and went to the toilet, which was between the front and rear of the flat in the corridor, and he went out of the room leaving the door partly open, and that Radtke came out of the bedroom and followed Taylor out and closed the door; that he (witness) did not see but heard the shots; that Mrs. Radtke opened the door and that he then saw Radtke standing at the stairway leaning on the sink and Taylor was standing on the steps with a gun in his hands; that Mrs. Radtke walked toward Radtke and that at that moment he started to fall backward across the sink; that she caught him and held him; that he was dead when the police arrived. On cross examination Crowden said he had testified in the Criminal court that he thought Radtke was in a quarrelsome mood on that day and that when Taylor went out Radtke followed him out and in a few seconds he (witness) heard the shots; that the men had not been drinking and





that Radtke and Taylor had no words so far as he knew. Radtke was about five feet eight and a half inches tall and weighed about 170 pounds; Taylor weighed about 145 pounds.

Mrs. Radtke testified that Taylor said, "He is not going to get me." The remark was stricken out by the court.

Defendant contends that the judgment should be reversed because this suit was brought by Mrs. Radtke rather than by the executor and administrator, and cites Bishop v. Prudential Ins. Co., 217 Ill. App. 112; McDaniels v. Eastern & Southern Ins. Co., 332 Ill. 603, to that effect. This policy gave to defendant insurance company the option of paying to the executor or the administrator, or some other person, as recited in the foregoing statement of facts. Defendant company seems to have exercised that option by making a payment of the life insurance liability to plaintiff, who had paid the funeral expenses of her deceased husband, and having exercised that option in her favor, we think as a matter of fairness and justice it cannot now reject the option and defend upon the theory that she is not executor or administrator. Although not conclusive upon this point, the proposition is illustrated in O'Connor v. Harrison, 132 Ill. App. 264, and Guyer v. Warren, 175 Ill. 328. A recovery by plaintiff under the circumstances will fully protect defendant from any other suit upon the same claim. Bishop v. Prudential Ins. Co., 217 Ill. App. 112. We are therefore not disposed to reverse the judgment for that reason.

We think, too, that the proofs of loss were sufficient, and if not, that further and other proofs were waived by defendant company. Wilkinson v. Aetna Life Ins. Co., 240 Ill. 203; Anderson v. Inter-State Accident Assoc., 354 Ill. 538. Nevertheless, the burden of proof was upon plaintiff to show that the death of the insured resulted from bodily injuries sustained solely through external, violent and accidental means. The injury under the evidence which



appears in this record was not accidental, if as a matter of fact deceased was the aggressor in a controversy between himself and Taylor in such a way as to lead to the shooting that resulted in his death. Hutton v. States Accident Ins. Co., 267 Ill. 267; Cory v. Woodman Accident Co., 333 Ill. 175. If there was any evidence in the record from which a jury could reasonably find that the deceased was the aggressor, then it was error for the court to direct a verdict and the issue should have been submitted to the jury for decision. This is the general and well known rule in this State. Bailey v. Robinson, 233 Ill. 614; Garrity v. Catholic Order of Foresters, 243 Ill. 411; Union Bank v. Metropolitan Life Insurance Co., 266 Ill. App. 345. We, of course, express no opinion upon the weight of the evidence other than to assert that it was sufficient that to require the issue of fact as to whether decedent was the aggressor be submitted to the jury. The policy must be construed liberally in favor of the insured. Healey v. Mutual Accident Assoc., 133 Ill. 556.

For the error of the court in directing a verdict, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.



37568

CHICAGO LAUNDRY OWNERS ASSOCIATION,  
a Corporation (not for profit), et al.,  
Appellees,

vs.

AMERICAN WET WASH LAUNDRY, INC.,  
a Corporation, et al.,  
Appellants.

INTERLOCUTORY  
APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

276 I.A. 604<sup>1</sup>

MR. JUSTICE MCGURRY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by defendants from certain orders granting plaintiffs temporary injunctions and denying defendants' motion to vacate the same.

The litigation arises out of a price war between factions in the laundry business in Chicago. Upon the complaint and an amended and supplemental complaint, the answer of defendants and evidence heard by the chancellor, defendants were temporarily enjoined from doing laundry work for less than a named price and also from doing certain other things calculated to injure the business of plaintiffs.

It should be remembered that upon an appeal from an interlocutory order this court does not determine finally the rights of the parties. As was said in McDougall Co. v. Woods, 247 Ill. App. 170, the primary purpose of the statute allowing an interlocutory appeal from a temporary order is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the order probably was necessary to preserve the rights of the parties. Whether a temporary injunction should be sustained depends not only upon the probability <sup>a</sup> that/case for plaintiff will be made out on a final hearing, but also upon the relative injury that might be sustained by the parties by the action of the chancellor in granting or refusing an injunction.

The complaint alleges that the 179 plaintiff laundries had



been in business for many years, with investments exceeding thirty-five millions of dollars, serving about two hundred thousand families in Cook county with laundry service; that each of the plaintiffs owns and operates laundries in Chicago, having invested sums ranging from \$5,000 to \$1,000,000 for plant, machinery and other assets; that many of the plaintiffs have real estate upon which their plants are located and have borrowed money mortgaging such plants, which are especially constructed for the laundry business; others have entered into long term leases and are obligated to pay a fixed rent; many of the plaintiffs have expended as much as \$50,000 a year for advertising; they employ over ten thousand workers, and in prosperous times have employed about seventeen thousand workers.

Plaintiffs allege that prior to the Fall of 1933 there were ruinous competitive price wars in Chicago in the laundry business, as a result of which the industry suffered losses and could not render proper service; there were constant strikes and labor trouble because of low wages paid employees; that competitors poached on each other's customers and help, thereby the good will and investments of the parties were being constantly destroyed or impaired.

That in August, 1932, the plaintiffs and the defendants voluntarily became members of an organization called the Chicago Laundry Owners Association and adopted certain by-laws and agreements to control the industry, whose purpose, it is alleged, was solely to avoid the destructive conditions existing in the business. The by-laws are set forth in the complaint. They are in the usual form of by-laws governing a voluntary association of men engaged in business. It was agreed by the members that certain things should constitute unfair practices and trade competition such as interference between members and their customers by false or deceptive means, selling service below cost with the intent and effect





of injuring a competitor, disparagement of a competitor to customers, deceptive advertising, maliciously enticing away employees of competitors and obtaining lists of customers of competitors without the consent of such competitor.

It was also agreed that the Association might announce reasonable minimum prices from time to time to be charged for certain services; that such minimum prices should be based upon the actual cost of production, and it was agreed that any attempt of the members to secure business from other members at prices less than basic cost would be solely for the purpose of injuring the competitor and of driving him out of business, thereby substantially lessening competition and tending to create a monopoly for such price cutter, and that such methods should constitute unfair trade practices and unfair competition. It was also agreed that the Association, acting in its name for all the members, should be entitled to apply to the courts for injunctive relief to prevent unfair trade practices and unfair competition on the part of any of its members.

The complaint further alleges that after all the members, including plaintiffs and defendants, had submitted figures, a tentative schedule recommending a certain price was proposed, which was, at a meeting in October, 1932, discussed, approved and adopted by all the members; that based upon the schedule of rates adopted, contracts of employment were made with union employees at wages based upon such schedule.

The complaint sets out at some length the economic conditions in the United States and elsewhere in the Fall of 1932 and the beginning of 1933, as a consequence of which the national, city and state government officials and legislative bodies, by various rules and legislation, sought to relieve unemployment and to rehabilitate industry generally; that certain codes were proposed by the national



authorities for the purpose of prohibiting unfair competitive practices, selling below minimum prices, deceptive and unfair practices, and interference with contractual relations.

The complaint alleges that laundry service is not an article of merchandise, or commodity, as defined by the anti-trust laws of Illinois; that it is a form of personal service consisting of washing laundry for individual families - calling for, washing and returning such laundry.

The complaint alleges that on or about January 1, 1934, the defendants conspired with each other, and others, to engage in destructive and ruinous trade competition with the purpose and effect of destroying the laundry industry of Chicago, and to inaugurate and maintain a system of price cutting so as to compel plaintiffs to operate at a loss, to deprive plaintiffs of their respective customers and to injure their business and investment and to violate the by-laws and regulations of the Association, and also to violate the codes proposed under the National Recovery Act; that pursuant to such conspiracy defendants commenced a system of deceptive "bait" advertising whereby they sought to deceive customers and prospective customers of plaintiffs into believing that the defendants would render wet wash laundry service for 3¢ a pound, whereas in fact said 3¢ price was only on additional pounds in excess of fifteen pounds; that the fact the price for the first fifteen pounds was four and six-tenths <sup>cents</sup> a pound was concealed; that defendants instructed their employees to solicit plaintiffs' customers to patronize defendants; that full page advertisements were inserted in the leading newspapers in Chicago containing such deceptive advertising which was signed jointly by the seventeen defendants, and that such deceptive "bait" advertising was made through circulars, billboard signs, radio broadcasts, in addition to the advertising in newspapers; that as a result of these actions

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the businesses of plaintiffs would be seriously and permanently affected as customers would expect a similar 40% price reduction in other services.

The complaint prayed that the defendants be restrained from engaging in any conspiracy or combination for the purpose or with the effect of injuring or damaging the plaintiffs, from violating the rules and by-laws of the Association, from engaging in destructive trade competition, interfering with plaintiffs' businesses, employees or customers, from inaugurating or maintaining any system of price cutting for the purpose and with the effect of compelling plaintiffs to operate their businesses at a loss, from advertising wet wash laundry at 3¢ a pound or from reducing the price below that fixed from time to time by the Association, from soliciting and threatening other members of the Association to compel them to join said conspiracy and from doing any other acts in violation of the agreements.

February 5, 1934, defendants filed their sworn answer in which, among other things, they asserted that the by-laws of the Association which plaintiffs claimed were breached by defendants are null and void; that the complaint fails to show any acts of defendants constituting unfair competition, and that the complaint discloses no violation of the acts and codes promulgated by the national authorities.

February 6th, by agreement of all the parties, the court entered an order providing against the deceptive advertising engaged in by the defendants, and on February 10th, by agreement of the parties, the court entered a temporary injunctive order restraining the defendants from furnishing wet wash laundry service at a price less than fifteen pounds for 69¢ and 3¢ for each pound over such fifteen pounds; also, defendants were restrained from advertising wet wash laundry service at prices

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below these figures and from soliciting the customers of any of the other parties to this cause, and from advertising in a manner and form calculated to deceive customers. The injunctional order also recited that its sole purpose was to maintain the status quo until the court should hear evidence and pass upon the issues presented by the pleadings, and without prejudice to the rights of any of the parties to move for its modification at any time prior to the final determination of the cause upon the presentation of such evidence as may tend to show that any of the parties is injuriously affected. By agreement the giving of an injunction bond was waived.

By agreement of the parties the court appointed Professor Himmelblau, head of the department of accounting of Northwestern University, to investigate and report on the cost of wet wash laundry service, and plaintiffs and defendants agreed to submit their respective cost figures to him. April 13th the court received a report from Professor Himmelblau and also heard evidence in open court on the question of cost of service. April 14th plaintiffs filed an amended and supplemental complaint, alleging with more particularity the so-called deceptive "bait" advertising, and on the same day the court entered another restraining order which is substantially the same as the order of February 10th except that the minimum price fixed for wet wash laundry service was 4½¢ for each pound instead of fifteen pounds for 60¢ and 3¢ for each additional pound as provided in the order of February 10th.

April 23rd another restraining order was entered modifying the injunctional order of February 10th by adding a minimum price on certain types of laundry service other than wet wash laundry service. May 4th defendants moved to vacate the injunctional orders entered April 14th and April 23rd, which motion was denied and this appeal followed.

Defendants in this court base their argument for reversal

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. J. I. A. 1978



mainly upon the claim that the by-laws, rules and orders of the Laundry Association are null and void as in violation of the criminal statute of Illinois, the common law, and contrary to public policy and the constitution of the State of Illinois and of the United States. To this plaintiff's reply that the issuance of the restraining order was not based primarily upon the validity of the by-laws but upon the presentation of facts tending to show that defendants were engaged in a conspiracy to destroy plaintiff's businesses by unfair competition through price cutting and misleading advertisements.

We are of the opinion that plaintiff's made a showing of such conspiracy sufficient to justify the temporary injunctions. The record shows that defendants used deceptive advertising in a widespread manner - in newspapers, signboards, and by other methods. These advertisements were calculated to deceive customers into believing that the defendants whose names appeared upon the advertisements were rendering wet wash laundry service at a price less than that which had been agreed upon by the defendants not only as members of the Association but also by their agreement to the injunctive order of February 10th. There was evidence tending to show that defendants were selling laundry service at a price below the cost to the defendants of such service, with the object of eliminating the plaintiff's from business and thereafter monopolizing such business for themselves. It has been settled by many notable decisions that acts whose sole purpose is to cause injury to one's property or that interfere with his business by destroying his credit or his profits, authorize the issuance of a preliminary injunction. 32 U. J., p. 54, sec. 32.

In Tuttle v. Buck, 107 Minn. 145, a banker established a barber shop for the sole purpose of injuring plaintiff's barber shop. The court held that when one starts an opposition place of

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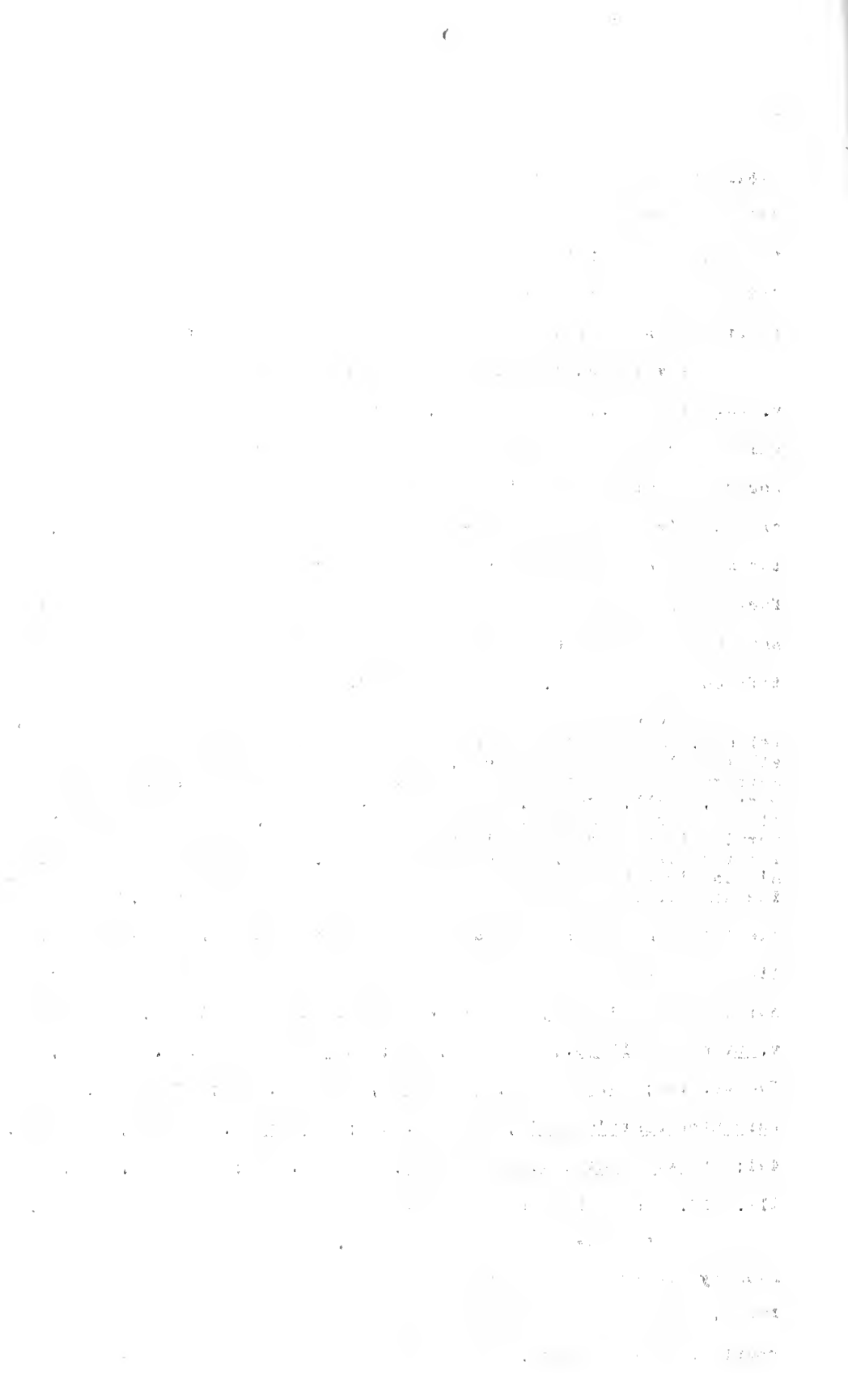
business regardless of loss to himself for the sole purpose of driving some one else out of business, he is guilty of a wrong; that such conduct is not competition in its legal sense and is "simply the application of force without legal justification, which in its moral quality may be no better than highway robbery."

A vivid statement of this same principle is found in Bozza v. Furniture Co., 163 Iowa 106, where the exclusive agent for the sale of sewing machines in a certain territory sued the defendant because of his advertising sewing machines of the same make as plaintiff's machines at one-half the price charged by plaintiff; the machines advertised by defendant as the latest models were in fact out of date and it was shown that the purpose of the defendant in so advertising and selling its machines was to put the plaintiff out of business. The court said:

"Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor. The law will not permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong."

The following cases also support the rule that an injunction will lie to prevent a competitor pursuing a course of conduct whose sole purpose is to destroy and drive another out of business: Dunshoe v. Standard Oil Co., 152 Iowa, 618; Stewart Land Co. v. Perkins, 290 Mo. 194; Burlington v. Minchcliff, 219 Ill. 159; Carlson v. Carpenter Contr's Ass'n, 306 Ill. 331; Willett v. Herrick, 242 Mass. 471; Franklin Union v. The People, 220 Ill. 355; Wilson v. Hey, 232 Ill. 399. And this too regardless of National Recovery Act codes.

Defendants say that plaintiffs, when they organized the Laundry Owners Association and fixed prices in accordance with its rules, did so in violation of the law and hence did not come into court with clean hands. It should be noted that these by-laws and



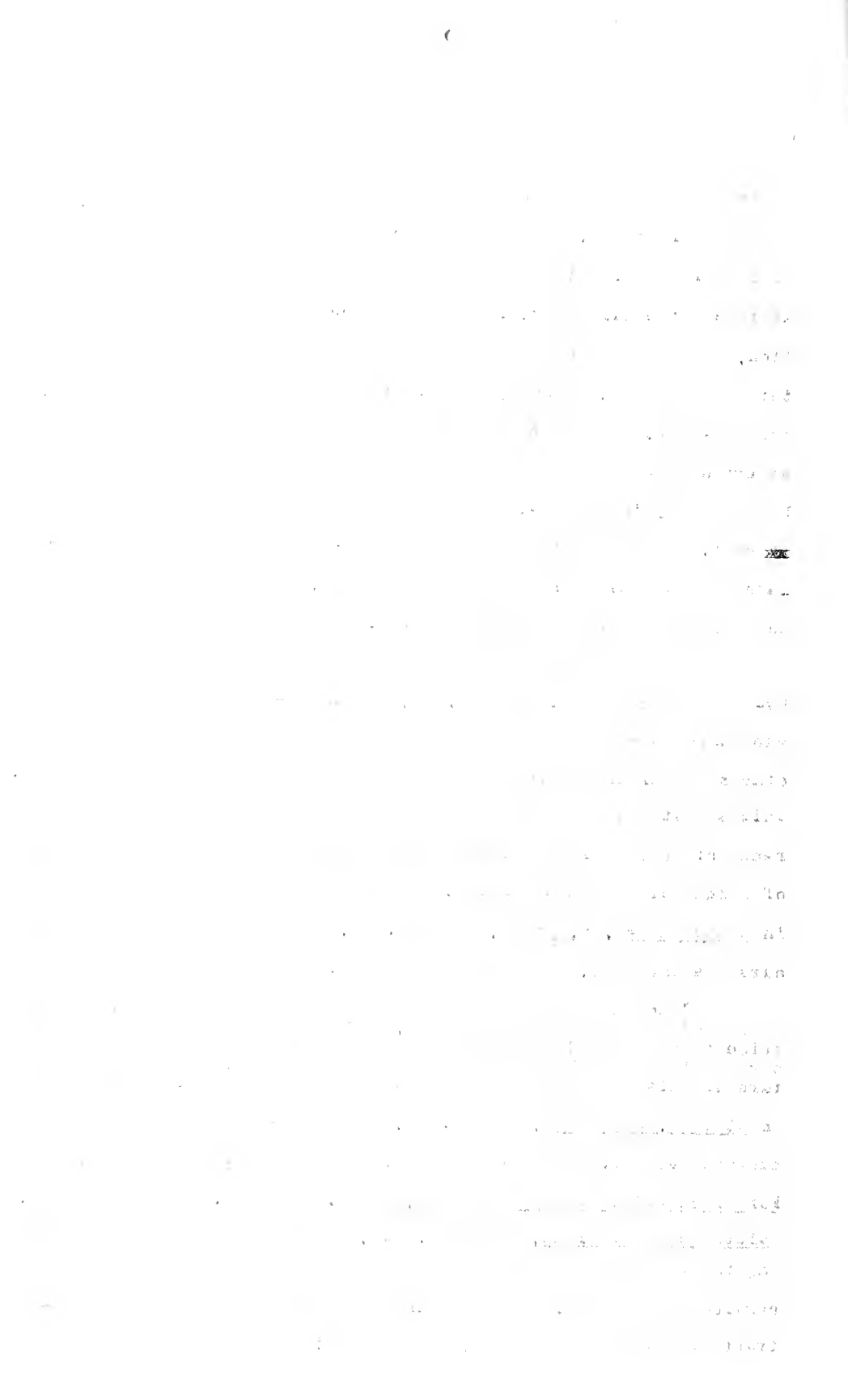
orders were the products of the joint action of both the plaintiffs and the defendants. There is force in the suggestion that when plaintiffs entered into contracts with employees as to wages and as to other obligations, relying upon the by-laws of the Association, that it was unfair for the defendants, without resigning from this Association, to engage in practices specifically condemned by such by-laws. There is a certain inconsistency in defendants now asserting that plaintiffs have no standing in a court of equity because they invoke by-laws in whose creation the defendants took ~~an~~ part. However this may be, we are of the opinion that the by-laws and the rules promulgated thereunder, standing alone, are not null and void as contrary to law.

The criminal statute of Illinois with which it is said the by-laws are in conflict, Chap. 36, para. 896-905 (Lamill) 1943, in substance makes illegal any agreement between corporations and others to fix the price "of any article of merchandise or commodity." This statute does not apply to laundry service for at least two reasons: (1) merely washing articles is not furnishing an article of merchandise or a commodity. We are in accord with the statement in State ex rel. v. Frank, 114 Ark. 47, where a statute similar to ours was involved, where the court said:

"The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the Legislature of this State has not made such an agreement unlawful."

In State v. McClellan, 155 La. 38, it was held that the laundry business was not trade or commerce. See also United States v.

Fur Dressers' & Fur Dyers' Ass'n, 5 Fed. (2d) 869. And in State v. Duluth Board of Trade, 107 Minn. 506, where the court was considering the charges whether an agreement to make uniform charges for the services of the Board of Trade in making sales violated the anti-trust statutes of the state, it was said:



"Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the federal anti-trust law . . . . That combinations and agreements, the sole and only purpose of which is to fix the charges that shall be made for personal services, are not within the prohibitions of the statute."

Defendants cite Ruckelsh v. Martens, 108 N. J. L. 339, as holding that laundry service is a commodity. Reading the opinion indicates that the court did not consider this question but merely left to the jury whether it was the intention of the parties to control prices to the detriment of the public, and if it was <sup>it was</sup> illegal and if it was not it was legal. (2) The statute is concerned with preventing monopolies. Plaintiffs' complaint charges that thousands of low priced washing machines are constantly sold and used by the public and that it is impossible for laundries to monopolize wet washing because every family can do its own wet washing. Wet washing is simply washing articles without drying or ironing. The Illinois statute and decisions of our courts against price fixing are directed against monopolies in fact. Agreements as to price fixing or against below-cost selling without an intention to establish a monopoly are not condemned. Plaintiffs argue that the by-laws of its association were not intended to, nor did they in fact tend to, create a monopoly against the public.

The record also shows that there are a large number of laundries in Chicago not members of the plaintiffs' association.

The record tends to show that the by-laws were adopted for the purpose of providing adequate and proper service to the public by avoiding unsatisfactory laundry work with cheap help employed because of price wars, and to avoid strikes and labor troubles.

In Appalachian Coals, Inc. v. U. S., 233 U. S. 344, an arrangement providing for the fixing of prices by the officers of a selling agency of coal was approved. The court in a lengthy opinion discusses such arrangements and concluded that -

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"A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

Many other pertinent quotations might be made from decisions in other jurisdictions. Whitwell v. Continental Tobacco Co., 125 Fed. 454; United States v. Standard Oil Co., 173 Fed. 177; Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106; New York Clothing Mfrs.' Exchange v. Textile Finishers' Ass'n, 265 N. Y. S. 105; New State Ice Co. v. Liebmann, 285 U. S. 262.

Defendants say that regardless of decisions in other jurisdictions the laws of Illinois prohibit all combinations in restraint of trade and free competition. We do not find that the decisions of Illinois are in conflict with what has been cited from other jurisdictions. In Southern Fire Brick Co. v. Sand Co., 223 Ill. 616, where there was an agreement which it was claimed tended to fix the price of fire clay, the court held that it was not the purpose of the Illinois statute to hinder or prohibit contracts on the part of corporations or individuals "made to foster or increase trade or business;" that "a contract may incidentally restrain competition or trade without violating the statutes if its chief purpose is to promote and increase the business of those who enter into it." The recent case of Moody & Waters Co. v. Case-Moody Corp., 354 Ill. 82, is in point. The business of manufacturing and selling pies in Chicago was the victim of certain bad trade practices and abuses; the parties met for the purpose of discussing this situation and entered into a contract with reference to the future

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

business; it was contended that the contract was illegal as tending to create a monopoly and as limiting the quantity of the commodity to be manufactured. The court held that it was clear from the record "and a consideration of generally known facts," that the parties to the contract could not prevent competition in the pie trade; that the machinery for the manufacture of pies was at all times to be had in the market. The court said that it was the purpose of the anti-trust acts to avoid the injuries to the public arising out of a monopoly; that "The test to be applied is whether such contracts and combinations by their inherent nature operate to the prejudice of the public interest by unreasonably restricting competition or obstructing the course of trade. Such contracts are within the inhibitions of the anti-trust laws of this State. The fact that such a contract incidentally restrains competition or trade does not of itself show a violation of the statutes if it does not unreasonably do so and its chief purpose is to promote an increase of the business of those who enter into it. Agreements in general restraint of trade are void, but those in reasonable partial restraint, founded upon a valid consideration, may be sustained where such corporations are not engaged in a public business." The opinion further states that the public policy of the State, as declared by section 22 of article 4 of the constitution, is not opposed to the elimination of competition in all cases, but applies only where a monopoly, in the sense in which the word was used at common law, would be created. This opinion is in accord with the modern trend of decisions elsewhere.

The record shows that in the injunctive orders the right was reserved to any party feeling himself injured to apply for a modification of the order. From the fact that the defendants acquiesced in the injunctive order of February 10th but appealed from the later orders, which increased the minimum price, indicates



that the gist of defendants' grievance is the minimum price fixed in the later injunctive orders. This, if not based upon the facts, may be corrected at any time upon a proper showing. The court should not and will not fix minimum prices which would compel the public to pay an unreasonable price for laundry service. The rule of reason is the guiding star to be followed constantly in determining the interests of the public and of the parties litigant.

The cause was referred to a master in chancery to take evidence and report conclusions and the matter is still pending before him, and we are informed on oral argument that the taking of evidence is still in process. We are now holding only that under the circumstances there was no abuse of discretion on the part of the chancellor, who could rightly hold that the benefits derived from continuing the injunctions would be greater than those which would follow should they be dissolved.

Counsel set forth and discuss at some length the National Recovery Act and codes, and national legislation and utterances of government officials. We do not discuss these for the reason that, as we are informed by counsel, the parties to this cause are not operating under the National Recovery Act or any code of the Federal Government.

Defendants raise the point that the court erred in failing to require the filing of plaintiffs' bond. In Central Trust Co. v. McGurn, 257 Ill. App. 45, we held that the reviewing court may examine the whole record to determine whether a bond should be required from the complainant. Here the record shows that the original injunctive order of February 10th was entered by agreement and bond was waived by agreement. Moreover, when the order of April 23rd was entered defendants objected to the entry, and upon the court inquiring as to the grounds of the objection, replied that they had nothing to say. Furthermore, in the injunctive order of April 23rd it is recited that in the orders of



February 10th and April 14th the giving of bond was waived by the agreement of the respective parties.

The record discloses no convincing reasons to disagree with the interlocutory orders of the chancellor and they are affirmed.

AFFIRMED.

O'Connor, P. J., concurs.

Ketchett, J., dissents. (See next page.)





## MR. JUSTICE MATCHETT Dissenting.

In this case the majority owners of laundries engaged in that business are granted an injunction against minority competitors, for the purpose of enforcing an agreement made by the parties to fix the minimum price for certain services usually performed at the request of their respective customers. I think this order should be reversed.

1st. The customers of these organizations are not parties to the proceeding. The public was not represented at the hearing. Neither the public nor the customers were given notice of the proceedings. As to these there was no due process of law. The order of the court was as to them purely capricious and arbitrary, as much so as if no court existed by which rights might be determined.

2nd. Because such contract is void as against public policy of the State as expressed in its Constitution, Article 2, Section 2, and as declared in many decisions of its courts. These cases are cited in the brief for defendants but not discussed in the brief for complainants. People v. Aachen & Kunich Fire Ins. Co., 126 Ill. App. 636; People v. Chicago Gas Trust Co., 130 Ill. 268; Mora v. Bennett, 140 Ill. 69; Bishop v. American Preservers Co., 157 Ill. 284; Harding v. American Glucose Co., 182 Ill. 351; C. W. & V. Coal Co. v. People, 214 Ill. 421; Wall v. Pfanschmidt, 265 Ill. 180; Griffiths & Sons Co. v. Fireproofing Co., 310 Ill. 331; Hall v. Todd, 325 Ill. 114. The above are a few of the many authorities which might be cited. If a different rule is now to prevail, it should be first declared by the Supreme court of the State.

3rd. I do not question the validity of the rule as well illustrated by Tuttle v. Bucky, 107 Minn. 145, as to the liability



of one who uses the weapon of competition maliciously to ruin the business of another. The courts of this State have not been slow to apply the proper remedy for such a wrong. Burington v. Hinchliff, 219 Ill. 159; Carlson v. Carpenter Contractors' Association, 305 Ill. 331. These cases show how unnecessary is the interposition of a court of equity in a case like this (in its very nature collusive) in which in my opinion the inevitable result is a license to plunder the public.

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RALPH H. JACKSON, doing business  
as RALPH H. JACKSON & CO.,  
(Plaintiff) Defendant in Error,

v.

G. CLYDE PERSON,  
(Defendant) Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

276 I.A. 604<sup>2</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In an action of the first class in the Municipal court of Chicago, Ralph H. Jackson, doing business as Ralph H. Jackson & Company, plaintiff, sued G. Clyde Person, defendant. In a trial before the court with a jury there was a verdict finding the issues in favor of plaintiff and assessing his damages at the sum of \$4,500. Defendant sued out this writ of error to review a judgment entered upon the verdict.

No point is raised on the pleadings. Defendant in error's (hereinafter called the plaintiff) theory of fact was that plaintiff in error (hereinafter called the defendant) was interested in exchanging his property for the property of Max Malter, provided satisfactory terms might be reached; that pursuant to his employment by defendant plaintiff obtained a person (Max Malter) who was ready, willing and able to exchange his real estate for real estate owned by defendant upon the terms and prices named by defendant, and that under the terms of his employment plaintiff was entitled to recover a commission equal to three per cent. of the price of defendant's property. Defendant's theory of fact was that he did not authorize an exchange of the properties at the price and terms at which Max



Malter was willing to make the trade "and that the offer of Max Malter was made in the form of a written contract, which was ineffective and would have been unenforceable had it been entered into."

Defendant contends that "the plaintiff failed to sustain the burden \* \* \* of establishing, by a preponderance of the evidence, that the defendant had authorized the basis and terms of the proposed exchange of properties." Defendant states that "the primary question of fact disputed by the parties concerning which each gave a different version, was whether the defendant, at any time prior to the submission to him of the final contract signed by Malter, agreed with the plaintiff to consider an exchange of properties in which Malter's vacant property was to be valued at \$125,000 (or \$2,500 per foot) as provided in the contract and also to accept, in lieu of all cash for the difference in the valuations of the properties, \$25,000 cash and the balance in the form of a first mortgage to be given back by Malter," and argues that as "the only witnesses offering testimony with respect to this question were the two parties to the suit," and as "the statements of facts made by plaintiff were flatly and categorically denied by defendant, an equally credible witness, that therefore plaintiff failed to establish his case by a preponderance of the evidence." The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying as to any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where the weight or preponderance of the evidence lies, it is not necessarily determinative, and a jury may be fully warranted in finding in favor of a party





even if his case is supported by the lesser number of witnesses. It was the province of the jury to pass upon the credibility of the two witnesses and to determine the weight, if any, that should be attached to their testimony.

"The witness' manner, demeanor and bearing upon the stand, - his replies, whether frank and open or reluctant and evasive, - his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, - \* \* \* are always of vital importance in determining to what, if any, credit the witness is entitled." (Ill. & St. L. R. R. & C. Co. v. Ogle, 92 Ill. 353, 362.)

It is not the law that a verdict which rests alone upon the testimony of one party who is contradicted in toto by another, where both appear to be equally credible, will be set aside upon appeal. (See Eimer v. Miller, 255 Ill. App. 465, 470, and cases cited therein; Shevalier v. Seager, 121 Ill. 564, 570; Hayden v. Miller, 205 Ill. App. 147, 148; Mills & Co. v. Duke, 232 Ill. App. 277, 280.) As stated in this last mentioned case (p. 280):

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. The People v. Greenberg, 302 Ill. 566; The People v. Boetcher, 298 Ill. 580; The People v. Maciejewski, 294 Ill. 390.)" (See also Ryan v. Harty, 200 Ill. App. 470; Rollins v. Kroncke, 262 Ill. App. 648 (Abst.)

In the late case of The People v. Fortino, 356 Ill. 415, 420, the court said:

"This court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v. Schanda, 352 Ill. 36; People v. Zurek, 277 id. 621."

After a careful reading of the testimony of plaintiff and defendant, we have reached the conclusion that the jury were justified in finding the facts as stated by plaintiff. Defendant's counsel, in their brief, admit that defendant "was a person of some eccentricity of manner and speech," and that he was "a man possessed of a somewhat unbalanced emotional nature." We find a number of statements made

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the facts as stated by defendant. Defendant has not been able to produce any evidence to show that he has been wronged or that he is entitled to any relief.

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[illegible]

by defendant of a kind that would naturally tend to make a jury question his testimony. In our judgment the instant contention of defendant is without merit. Two juries have found for plaintiff upon this claim and the trial judge in each case approved the verdict of the jury.

We find no merit in the contention of defendant that the court erred in admitting the proposed written contract of exchange submitted by plaintiff to defendant for his signature.

In his reply brief defendant advances the following point: "The plaintiff's whole case was predicated upon the contract as finally drafted and signed by Malter. Plaintiff's statement of claim specifically recited that his performance of the services he had been employed to render was the procurement of a real estate exchange contract in the usual form providing for an exchange of the properties and it further alleged that at the time of the execution of said exchange contract by Malter he was ready, willing and able to enter into and consummate the same;" "that the (written) contract was the only legitimate evidence of the deal Malter proposed to make and that it showed upon its face his unwillingness to make such deal after May 3rd, 1927, which time limit had expired when the contract was submitted to the defendant;" that the said contract, dated April 30, 1927, signed by Malter and presented to defendant, contained the following: "It is specifically understood that this contract becomes null and void unless deposited in escrow with Chicago Title and Trust Company before 5 P. M., Tuesday, May 3, 1927." Defendant argues that the evidence shows that this contract was first presented to defendant on May 5, and that as Malter had a time limit attached to the proposed contract it was "null and void" when it was first presented to defendant. In the view that we have taken of the instant contention we deem it unnecessary to



consider the point made as to plaintiff's statement of claim, nor need we determine the contention of defendant that the written contract was not submitted to him until May 5, 1927, although we may say that the testimony of defendant indicates that the contract was submitted to him on or before May 3. The trial court delivered the following oral charge to the jury:

"The Jury are instructed that if you believe from a preponderance of the evidence that the plaintiff obtained Max Malter to trade a certain property of his for that owned by the defendant, and if you further believe from the preponderance of the evidence that said Max Malter was ready, willing and able to trade the property owned by him for the property of the defendant upon the terms and at the price given by the defendant to the plaintiff, then the defendant is entitled to recover a commission equal to three per cent. of the price named by the defendant, to-wit, one hundred and fifty thousand dollars, if you believe from the evidence that there was an agreement to pay the same, notwithstanding that the defendant, Ferson, thereafter refused to make said exchange, and did not actually consummate the said transaction.

"The Jury are instructed that in order for the plaintiff to recover he is only bound to prove by a preponderance of the evidence that he obtained a person who was ready, willing and able to exchange or purchase the real estate owned by the defendant, Ferson, upon the terms and price named by said defendant to the plaintiff, and that defendant agreed to pay a commission of 3%; and the fact that the defendant did not actually consummate the transaction, and thereafter refused to consummate it, makes no difference in this case.

"The Jury are instructed that it is not necessary that there should be any written contract actually entered into between the defendant and the person who was about to exchange or trade for such real estate, and it is not necessary that there should be any written contract whereby the defendant, Ferson, employed the plaintiff to make such exchange.

"The Court instructs you that the owner of property is entitled to specify at what price and upon what terms he will sell or exchange his property, and that a broker employed by him to effect an exchange at certain prices for his and other property and upon specified terms, will become entitled to a commission only in the event he produces one ready, willing and able to enter into the transaction agreed to by the owner; and in this case, even though you may believe from the evidence that the plaintiff procured a person ready, able and willing to consummate a certain exchange of property with the defendant, yet if you find that the terms of such proposed exchange were at variance with the terms authorized by the defendant it will be your duty to find the issues for the defendant.

"The Court instructs the jury that if you believe from the preponderance of the evidence that the valuations of the property and the terms of the proposed exchange contained in the proposed contract signed by Malter and tendered by the plaintiff



to Person were not previously approved or authorized by the defendant, Person, then the defendant, Person, was under no duty to accept and was entitled to reject the same if he saw fit, and in such case plaintiff would not be entitled to a commission.

"\* \* \*

"The Court instructs the Jury that in order for a broker to be entitled to his commission on an exchange of property he must produce a customer willing and able to meet all the terms that the seller has stated to the broker would be satisfactory, and not only as to the valuation placed on the seller's property, but also as to the valuation at which the seller is willing to accept the property proposed to be given in exchange.

"The Court instructs the Jury that you are not to set yourselves up as a Board of Arbitration and take money from one party and give it to the other just because you can, or think you can. Your duty is to decide honestly and fairly whether the plaintiff has established by a preponderance of the evidence in this case that he procured a purchaser who was ready, willing and financially able to purchase the property of the defendant upon the terms which the defendant has stipulated in his dealings with the plaintiff, and unless you so find then your verdict should be for the defendant.

"The Court instructs the Jury that any property owner has a right to list his property with any broker on any terms he sees fit. The mere fact that he has so listed it does not entitle the broker to any compensation for his efforts to find a buyer, as he had the liberty to accept or refuse the terms of the listing, and the commission is due the broker only when the terms of the owner are accepted by the customer produced by the broker who is ready, able and willing to purchase on those terms, which the owner has given to the broker.

"\* \* \*

At the conclusion of the charge to the jury the following occurred:

"The Court: Any suggestions, either of you?

"Mr. Paullin (attorney for plaintiff): No.

"Mr. Pierce (attorney for defendant): I think not."

Rule 170 of the Municipal court provides:

"Either party shall have the right to present to the judge requests in writing for specific instructions to the jury as to matters of law, provided such requests are presented before the commencement of the arguments, or within such time thereafter as the court may deem reasonable, and it shall be the duty of the judge to include in his charge all instructions so requested which he considers as properly expressing points of law applicable to the decision of the case, but in so doing he shall not be bound to use the precise language of such requests provided such points of law are embodied in the charge in other language appropriate therefor."

It is apparent from a reading of the court's oral charge that both parties presented to the judge requests in writing for specific

Dear Mr. [Name]  
[Faint, mostly illegible text follows, appearing to be a letter or report. The text is mirrored and difficult to decipher, but seems to contain several paragraphs of information.]



instructions to the jury as to matters of law. Rule 171 provides:

"Objections to the charge must be made before the jury retire and must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made, and upon the objections being made the judge may make such corrections as he may deem proper."

From the record it appears that both parties approved the trial court's oral charge to the jury. The case went to the jury upon the theory of law that plaintiff was entitled to recover his commission if he produced a person who was ready, willing and able to exchange real estate upon terms satisfactory to defendant. Defendant is in no position to now urge the instant contention that "plaintiff's whole case was predicated upon the contract as finally drafted and signed by Malter," "that the (written) contract was the only legitimate evidence of the deal Malter proposed to make," and that said contract was null and void when it was presented to defendant. Defendant acquiesced in the following part of the court's charge to the jury: "It is not necessary that there should be any written contract actually entered into between the defendant and the person who was about to exchange or trade for such real estate," and that plaintiff was "only bound to prove by a preponderance of the evidence that he obtained a person who was ready, willing and able to exchange or purchase the real estate owned by the defendant, Person, upon the terms and price named by said defendant to the plaintiff, and that defendant agreed to pay a commission of 3%; and the fact that defendant did not actually consummate the transaction, and thereafter refused to consummate it, makes no difference in this case." Indeed, it is apparent that defendant suggested to the court the following part of the charge: "In order for a broker to be entitled to his commission on an exchange of property he must produce a customer willing and able to meet all the terms that the



seller has stated to the broker would be satisfactory, and not only as to the valuation placed on the seller's property, but also as to the valuation at which the seller is willing to accept the property proposed to be given in exchange." It is undisputed, in the record, that plaintiff wrote to defendant, on May 6, advising him that Walter, the prospective customer, had extended the time for obtaining the signature to the contract until Saturday noon, May 7.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

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37297

45-7

FREDERICK A. WILSON,  
(Plaintiff) Defendant in Error,

v.

HENRY B. KILGOUR,  
(Defendant) Plaintiff in Error.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

276 I.A. 604

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought by Frederick A. Wilson, plaintiff, against Henry B. Kilgour, defendant, to recover a real estate broker's commission and interest alleged to be due him. In a trial before the court with a jury a verdict was returned finding the issues for plaintiff and assessing his damages at the sum of \$8,687.50. This writ of error followed a judgment entered upon the verdict.

No point is made as to the pleadings. It appears from the record that there have been four trials of this cause. The first resulted in a verdict finding the issues for plaintiff and assessing his damages at the sum of \$3,125. Defendant's motion for a new trial was allowed by the trial court. In the second trial the jury found the issues for plaintiff and assessed his damages at \$8,968.50. Defendant's motion for a new trial was allowed by the trial court. Upon a third trial the trial court, at the conclusion of all of the evidence, directed the jury to find a verdict for defendant. Judgment was entered upon the verdict and plaintiff appealed. Upon that appeal we held that the trial court erred in directing a verdict for defendant and that it was apparent from the record that the trial court, in



directing the verdict, had passed upon the weight and preponderance of the conflicting evidence, and we reversed and remanded the cause for a new trial.

Defendant contends that the verdict of the jury in the instant trial is contrary to the manifest weight of the evidence. While this contention is strenuously argued, in view of the fact that three juries have found for plaintiff, we would not be justified in sustaining it.

The trial court, after reading the written instructions to the jury, then gave to the jury, of his own motion, the following interrogatory: "Did the jury in its verdict include interest, and if so, how much? Answer yes or no." When the jury returned its verdict it also returned the special interrogatory and the answers thereto as follows: "Did the jury in its verdict include interest, and if so, how much? \$2,437.50/100. Answer yes or no. Yes." Defendant contends that the court committed reversible error in submitting to the jury the special interrogatory; that the form of the interrogatory was such that it plainly suggested to the jury that plaintiff was entitled to a verdict. This contention is undoubtedly a meritorious one. Plaintiff, in the oral argument, admits that the special interrogatory, standing alone, is justly subject to defendant's criticism but asks us to consider the interrogatory in the light of all the instructions given and to hold that the jury could not have been misled by the interrogatory. We are satisfied that we would not be justified in so holding. As we read the interrogatory, the jury would naturally infer from its phraseology that the court expected the jury to return a verdict for plaintiff. As counsel for plaintiff admits that the interrogatory is bad, it is surprising that he did not suggest to the trial court the addition of a few words that would have cured it. Three juries

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have found for plaintiff, and it is a matter of regret that we are forced to reverse the instant judgment. We feel, however, that the giving of this special interrogatory was highly prejudicial to defendant, and as the material facts in the case were seriously controverted our duty is plain.

Other errors are assigned and argued by defendant but we deem it entirely unnecessary to pass upon the same.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.



37608

1934 STREETS OF PARIS, INC.,  
(Complainant) Appellee,

v.

CHARLES H. WEBER, CHARLES  
CONRAD and ARTHUR SCHROEDER,  
(Defendants) Appellants.

INTERLOCUTORY APPEAL  
FROM CIRCUIT COURT  
OF COOK COUNTY.

PARIS, INC., ANDREW N. REBORI,  
ROY HALL, JOHN H. McMAHON,  
INTERNATIONAL CAFE, INC., and  
RICHARD W. HOOD,  
(Defendants to Counter-  
claim below) Appellees.

276 I.A. 604<sup>9</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Complainant (appellee in this court) filed its verified bill against Charles H. Weber, Charles Conrad and Arthur Schroeder, in which it prayed that defendants, their agents, servants and attorneys, be enjoined from harassing, annoying or intimidating complainant, its directors, officers, agents or servants and attorneys, and from in any wise interfering with the peaceful possession and quiet enjoyment by complainant and its subconcessionaires of the premises leased to it by A Century of Progress and known as 1934 Streets of Paris; from instituting any suits at law or in equity against complainant or its subconcessionaires, or its officers, directors, agents, servants and attorneys, or either or any of them, or against A Century of Progress, in connection with any claim or claims which defendants or either of them might have arising out of a contract of Charles H. Weber with "Paris, Inc.;" that upon a hearing of the issues the injunction may be made permanent, and that complainant may have judgment against defendants in the sum of \$50,000 and costs. Defendant Weber filed a verified answer and counterclaim in which he denied complainant's claim and prayed specific performance of a contract entered into between him and Paris, Inc., which leased to him certain space in the concession

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known as Paris, Inc. at the Chicago World's Fair for the period "beginning with the opening of the concession known as Paris, Inc., at the Chicago World's Fair, which is now contemplated as June 1, 1933, and ending with the date of the closing of said concession at the World's Fair, which is now contemplated to be November 1, 1933, or for the duration of the Fair." The counterclaim also prayed an injunction against certain individuals, Paris, Inc., and 1934 Streets of Paris, Inc., the defendants to the counterclaim, enjoining them from asserting dominion or control over the premises demised to Weber by Paris, Inc., and over certain structures and properties upon said premises; from operating, during the 1934 World's Fair, any business, the exclusive right to which had been reserved to him under said lease; from interfering with his right to possession of said premises and the operation of his business thereon, and with the preparation by said Weber and his subconcessionaires for the re-opening of the World's Fair in 1934. The counterclaim also prayed the appointment of a receiver to take charge of the premises pending the litigation, or to receive the profits therefrom; a judgment for damages for breach of contract and discovery from the various defendants of the details of an alleged conspiracy to deprive Weber of his rights under his contract with Paris, Inc. A motion for a temporary injunction upon his verified answer and counterclaim was made by Weber, and thereafter, a motion was made by complainant for a temporary injunction upon the allegations of the verified complaint. Both motions were heard by the chancellor upon the complaint and answer thereto and the counterclaim of defendant Weber, and upon certain affidavits that were read in support of and in opposition to complainant's motion. No oral testimony was heard, but the chancellor admitted in evidence and considered "Rules and Regulations for Concessionaires of A Century of Progress 1933," adopted by A Century of Progress.



At the conclusion of the hearing the chancellor rendered the following opinion:

"The Court appreciates that to each of the interests involved here the matter is so important that they argued it at length. In order that the Court will be fully informed as to the facts, the Court, at the outset, carefully read the pleadings and the exhibits, and, as I went along, I also analyzed the situation, so that I think I have the matter pretty well in my mind.

"I remember that when talk first arose among civic leaders in Chicago, as to the advisability of holding a World's Fair, there was a discussion as to whether the Fair should be held in 1933 or in 1937; 1933 being the anniversary of the year when Chicago was incorporated as a village and 1937 the year in which it was incorporated as a city. At that time there were other cities that were contemplating holding a Fair. The people of Chicago, after considering it, and, I assume, to some extent, because of the depression which was then becoming apparent, decided to hold the Fair in 1933.

"When Chicago held its Fair known as the World's Columbian Exposition, it was planned to hold that in 1892, four hundred years after the landing of Columbus. Due to inability to get the matter in shape, it was postponed until 1893 and was held in 1893.

"After reviewing the entire subject here, the Court is satisfied that what was contemplated by everyone concerned was that a Fair would be held and that it would be held in one year. It was contemplated that the Fair would be held in the summer time and go on into the Fall, because from the nature of the construction it was apparent that it was never intended that the Fair should continue into the winter.

"A concessionaire or anyone else who made a contract with the corporation had a right to expect that his contract would carry him through the Fair as then contemplated. It is the opinion of the Court that no one contemplated that the Fair should continue two years.

"The Court finds that in the contract between the corporation, the Century of Progress corporation, and Paris, Incorporated, that what was contemplated was the operation of Paris, Incorporated, during 1933. Of course, if, for any reason the Fair had not gone on in 1933, then there would be plausible argument and probably good argument and weight in saying that the parties who entered into those contracts should have their contracts recognized for 1934. However, we know that the Fair of 1933 went ahead and was successful and the Court finds that the contract between the Fair corporation and Paris, Incorporated, and the contract also between Paris, Incorporated, and Charles H. Weber, covered only the period until the close of the Fair in 1933.

"Therefore the Court finds that Paris, Incorporated, did not have any right to a renewal of its contract or concession in 1934. Having decided that question, of course, the other matters that have been discussed follow as a matter of course.

"Therefore the complainant in this case, the 1934 Streets of Paris, Inc., a corporation, is entitled to the relief claimed.





The converse is likewise true, that the defendants are not entitled to relief they contend for in their counterclaim.

"I believe that covers all the points."

The order entered by the chancellor recites, inter alia:

"And the Court having construed the statute entitled, An Act in Relation to the Chicago World's Fair Centennial Celebration, enacted by the General Assembly, approved and in force on June 18th, 1929, and having construed the ordinance entitled, A Century of Progress Ordinance, ordained and passed on April 16, 1930, by the South Park Commissioners, a municipal corporation, and having construed the application for a permit for a concession to A Century of Progress, dated March 9, 1933, made by Paris, Inc. and accepted on March 10, 1933, by A Century of Progress, which application upon its acceptance became a permit for a concession from A Century of Progress to Paris, Inc., a corporation, and is attached to the defendant's (Charles H. Weber) counterclaim as 'Defendant's Exhibit 2', and the Court having construed the memorandum of agreement in the nature of a sub-lease between Paris, Inc., an Illinois corporation, and Charles H. Weber, entered into on March 30, 1933, and approved by A Century of Progress on March 9, 1933, which memorandum of agreement is attached to the defendant's (Charles H. Weber) counterclaim as 'Defendant's Exhibit 1', Doth Further Find:

"That the Chicago World's Fair or Exposition held and conducted by A Century of Progress, a corporation, in Chicago, Illinois, during the year 1933, closed and terminated on November 12, 1933, and that all rights of Paris, Inc., a corporation, and of Charles H. Weber, defendant herein, and of all parties claiming under them to operate any concession or sub-concession within the grounds of the Chicago World's Fair or Exposition terminated on November 12, 1933.

"The Court further finds that all the equities herein are with the plaintiff, 1934 Streets of Paris, Inc., a corporation, and that it is entitled to a temporary injunction as prayed for in its complaint, and that the defendant, Charles H. Weber, is not entitled to the temporary injunction or to the appointment of a receiver as prayed for by him in his counterclaim."

After a careful consideration of the record and the able briefs filed, we are satisfied that the chancellor was correct in assuming that the major question to decide upon the motions before him was, Had Weber any right to possession of the premises in question after the close of the Fair in 1933? The chancellor answered that question in the negative, and we are in accord with his conclusion in that regard.

Defendant Weber's entire claim is based upon the agreement of March 30, 1933, between him and Paris, Inc. That agreement was in the nature of a sublease and demised certain space in the con-

The first part of the report deals with the general situation of the country and the progress of the work during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and the plans for the future.

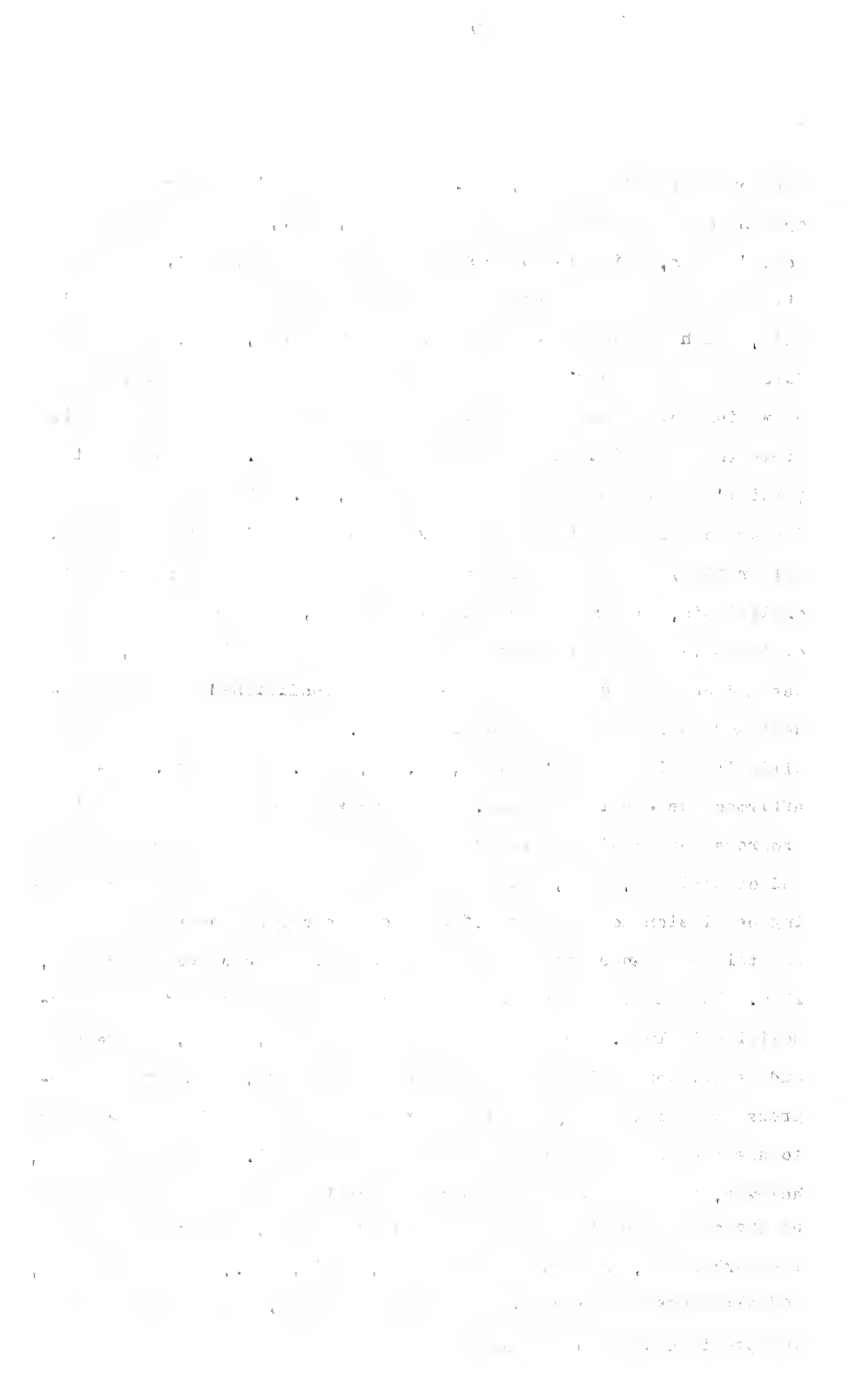
The second part of the report deals with the financial aspects of the work. It gives a detailed account of the income and expenditure for the year and shows how the funds have been used. It also includes a statement of the assets and liabilities of the organization at the end of the year.

The third part of the report deals with the personnel of the organization. It gives a list of the staff and their duties and also a list of the volunteers who have helped in the work. It also includes a statement of the training and development of the staff.

The fourth part of the report deals with the public relations of the organization. It gives a list of the public relations activities carried out during the year and also a list of the media coverage of the organization's work. It also includes a statement of the public opinion of the organization's work.

The fifth part of the report deals with the future plans of the organization. It gives a list of the projects and activities planned for the next year and also a list of the resources required for their completion. It also includes a statement of the objectives and aims of the organization for the future.

cession operated by Paris, Inc. for the period "beginning with the opening of the concession known as Paris, Inc., at the Chicago World's Fair, which is now contemplated as June 1, 1933, and ending with the date of the closing of the said concession at the World's Fair, which is now contemplated to be November 1, 1933, or for the duration of the Fair." The bill of complaint set forth certain provisions of the enabling acts enacted by the legislature of this state in connection with the 1933 and 1934 Fairs. The first act (Cahill's Illinois Revised Statutes 1929, ch. 127c) granted to A Century of Progress (then known as Chicago World's Fair Centennial Celebration) the use and occupancy of lands belonging to the State of Illinois, within and adjacent to Chicago, provided that if any of the said lands were controlled by any Park Commissioners, the use and occupation of the same should be conditioned upon the consent and approval of such Commissioners. The second act (Cahill's Illinois Revised Statutes 1931, ch. 32, secs. 528 et seq.) reaffirmed the earlier statute. The land selected by A Century of Progress was within areas controlled by the South Park Commissioners and on April 16, 1930, said Commissioners passed an ordinance granting permission to A Century of Progress to occupy the site selected and this ordinance was accepted by A Century of Progress on May 12, 1930. The enabling acts and the said ordinance provided for an exposition in 1933. For certain limited purposes, to wit, the removal and demolition of improvements upon the premises, A Century of Progress was permitted by the legislature and by the said Commissioners to use the premises selected after the year 1933. We are satisfied, however, that the chancellor was correct in assuming that in so far as the operation of an exposition was concerned, the legislature, the Park Board, A Century of Progress, Paris, Inc., defendant Weber, and all concessionaires and subconcessionaires, contemplated that the premises were to be used during 1933 only and that at the



expiration of the 1933 Fair, in so far as the operation of an exposition was concerned, the rights of A Century of Progress, Paris, Inc. and defendant Weber ceased and terminated. At a special session of the General Assembly of the state there was enacted a bill in relation to the celebration by A Century of Progress, which was approved February 28, 1934. Its preamble recites, in part, as follows: "Whereas, the said World's Fair and International Exposition so conducted by said A Century of Progress, closed and terminated on the 12th day of November, 1933" -- "Whereas, said A Century of Progress is a suitable and proper agency to conduct said Chicago World's Fair in the year 1934." The act provides that there is granted to A Century of Progress the use and occupation of all lands or rights therein of the State of Illinois, whether submerged or otherwise, within the present limits of the City of Chicago or adjacent thereto, which may be designated and selected by A Century of Progress "as the site or sites for the holding of said Chicago World's Fair to be held during the year 1934," and it provides that in case the site or sites finally located and fixed by A Century of Progress for said "Chicago World's Fair to be held during the year 1934," shall include lands the title or control of which is in any Park Commission, then and in that event the use of such lands for the purposes of said Chicago World's Fair to be held in the year 1934 "shall be conditioned upon the consent and approval of said Park Commissioners." On March 10, 1934, the South Park Commissioners enacted "An Ordinance authorizing A Century of Progress to Prepare for and to Operate During the Year 1934 a World's Fair upon Certain Lands and Water areas," and reciting that "the said World's Fair so conducted by said A Century of Progress Closed and terminated on the 12th day of November, 1933, and all rights of said A Century of Progress to operate said World's Fair ceased and expired on the said 12th day of November, 1933," and "it is desirable that permission and authority to prepare for and to operate during the year



1934 \* \* \* a World's Fair upon the land and water areas used and occupied for such purpose during the year 1933." By said ordinance the Commissioners granted permission and authority, under the conditions and terms set forth therein, to A Century of Progress to use all or such portion of land and water areas (designated on a map or plan attached to said ordinance) "as may be required for the purpose of constructing, bringing into being, conducting and operating a World's Fair in the year 1934." This ordinance was accepted by A Century of Progress.

It seems clear to us that the rights of A Century of Progress to operate a Fair terminated in 1933, and if we are correct in so holding, it would follow, of course, therefrom, that the rights of Paris, Inc., which operated a concession, and the rights of defendant Weber to operate a subconcession, necessarily ceased and expired at the same time. We may add that it appears from certain letters written by Weber's agent that the latter recognized that his rights in the premises expired at the close of the 1933 World's Fair. When his contract with Paris, Inc. is interpreted, as it must be, in the light of the statutes and ordinances to which we have referred, the only reasonable interpretation of the contract<sup>is</sup> that the rights of defendant Weber thereunder terminated at the close of the 1933 Fair.

When the chancellor determined upon the record then before him that Weber had no basis or right upon which to found his demand for possession of the premises it became his plain duty to enter the preliminary injunction that forms the subject matter of this appeal. Appellants have seen fit to argue at great length that the bill states no case for injunctive relief, but it is sufficient to say, in answer thereto, that we have carefully considered the bill and are satisfied that the complainant has stated therein a prima facie case entitling it to the preliminary injunction.

Appellants contend that the court erred in finding as a fact,





in the order appealed from, that the World's Fair Exposition conducted as A Century of Progress during 1933 terminated November 12, 1933, and that therefore all rights of Paris, Inc. and its sublessee Weber terminated with it; that such a finding is conclusive of Weber's right and should not have been made upon a motion for a preliminary injunction. We find no merit in this contention. The finding was based upon the record presented to the chancellor upon the motions for preliminary injunction made by both parties and it does not finally adjudicate appellant Weber's rights in the premises.

"An interlocutory injunction is merely provisional in its nature and does not conclude a right. It usually stands as a binding restraint until rescinded by the further action of the court." (The People v. Standidge, 333 Ill. 361, 365.)

The finding in question in no way bars appellants from presenting evidence upon the final hearing in support of their position nor from rearguing the question upon the record then made. But upon the state of the record presented to the chancellor it was obvious that it was necessary that temporary relief be afforded to the complainant or the counter-claimant, and we are satisfied that he did not abuse his discretion in entering the preliminary injunction.

The interlocutory order of the Circuit court of Cook county appealed from is affirmed.

INTERLOCUTORY ORDER AFFIRMED.

Griffley, P. J., and Sullivan J., concur.

1100

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:  
Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 005

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BE IT REMEMBERED, that afterwards, to-wit: On  
JUN 28 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
Circuit Court of the United States  
for the District of Illinois

February Term, 1934.

CHARLES H. HADLEY, et al., doing  
Business as HADLEY & WEAVER,  
Defendants in Error,

vs.

error to  
Circuit Court,  
Du Page County.

FRANK M. HANSON,  
Plaintiff in Error.

WOLFE -- P. J.

Hadley and Weaver, attorney of Heaton, Illinois, started suit against Frank M. Hanson, before a Justice of Peace of Du Page County, for attorney's fees they alleged to be due them for services rendered the said Hanson. They obtained judgment in the Justice of Peace Court for the amount of their claims. Mr. Hanson appealed the same to the Circuit Court. Trial was had before a jury in the Circuit Court and judgment rendered in favor of the plaintiff in the sum of \$374.83. From this judgment the defendant, Mr. Hanson, brings the case to this court on a writ of error.

The plaintiff in error filed an abstract in which many of the pertinent facts are missing. The defendant in error has filed a supplemental abstract setting forth some of the omitted facts. An examination of the abstract and record discloses that the firm of Hadley and Weaver represented Mr. Hanson in considerable litigation, extending over a period from January, 1928 to the early part of 1930. Mr. Weaver, one of the members of the firm of Hadley and Weaver, testified to the various services that had been rendered; that the charges against Mr. Hanson, were made at the direction of Mr. Weaver; that he knew the fair and reasonable charges for such service in Du Page County; that the charges they had made were fair, reasonable and customary for such services in that county. Mr. Hanson, the plaintiff in error, offered no evidence whatever to contradict this testimony. The abstract shows no objection made to any evidence of record



on either side of the trial in the case.

The plaintiff in error has insisted upon the ground that the judgment should be reversed but he has argued only one point, viz., 'that the verdict is contrary to the weight of the evidence.' Under the ruling of this court, an admission of error, not shown in the printed briefs in issue, is the only question for this court to decide, is whether the verdict and the judgment are supported by the weight of the evidence? In this case no objection to the verdict is brought by the rules of court heretofore observed, to and unless we can say that this verdict is manifestly against the weight of the evidence we could not be justified in reversing the case.

The trial court and the jurors had the advantage of seeing and hearing the witnesses testifying, and are in a better position than a court of review to pass upon and weigh the testimony of the various witnesses. The plaintiff in error does not seriously contend that Hadley and Leavelle did not do the work as itemized by them in their statement of account, but complain of the results obtained in the litigation, and that some of the litigation was caused by the defendant in error. As previously stated, the plaintiff in error offered no testimony to show that the value of the services rendered were not the reasonable, and customary charges that are customarily made by other lawyers for like services in Adams County. In the case of Hart v. Wilson, 177 Ill. App., page 41, the court had under consideration a case in many respects very similar to this case. The court in their opinion use this language: "The value of the services rendered was one of the vital issues in the case and the appellant knew it and he could have been prepared to present proof in support of his defenses that the charges were excessive. Failing in this, he cannot be heard to complain that the jury followed the oral evidence before them in fixing the amount the appellee was entitled to. We think the evidence fairly tends to support the verdict, and it is certain the verdict is not so manifestly contrary to the weight of the evidence, as to warrant a reversal of the judgment on that ground."









STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 605<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 28 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
Circuit Court of the  
County of Lake,  
State of Michigan.  
May Term, A.D. 1934.

Appellant  
vs.  
Appellee

STEWART J. JAMESON, Plaintiff,  
vs.  
JAMESON, Defendant.

W. H. H. J.

Appellant filed his petition in the Circuit Court of Lake county, asking that a decree of divorce theretofore entered against him, in favor of appellee, granting to her the custody of their two minor children, Marjorie J. Jameson, age eight, and Charles H. Jameson, age five, be modified and the custody of said children taken from appellee and given to appellant; alleging certain immoral conduct on the part of appellee which rendered her an unfit person to have the custody of said children.

Appellee had procured a decree of divorce against appellant in April 1931, granting her the custody of the children. This decree also provided that appellant pay the sum of \$17.00 per week for the care, support and education of said children.

The appellant charged appellee with certain immoral conduct which he claimed rendered her an unfit person to have custody of said children. Appellee filed her answer and hearing thereon was had by the trial court, which on August 26, 1933, reversed its order denying the petition of appellant. Appellant brings this appeal from the order entered.

Appellee maintained a residence in which he kept boarders and roomers. It appears from the evidence that one George Wolff occasionally called upon appellee at her residence, when the children were present. Appellant charges appellee with improper conduct with the said Wolff, before the children. The trial court recognizing the fact that









STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 605<sup>3</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 28 1934

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



AT ... D., 1934

OLIVER L. J. J., a minor, by  
MARTHA L. J., his mother  
and next friend,

Appellee,

vs.

vs.

FAIRBANKS, Inc.,  
Appellant.

HUNTER-J.

Appellant prosecuted this appeal in the circuit court of Lincoln county, Nebraska, and obtained a judgment in the sum of \$4000, upon a verdict returned by the jury in said cause.

The declaration in this case consisted of one count.

Appellee brought his suit by his mother and next friend, and as appellant, charging that while he was riding a bicycle, and in the exercise of due care and caution for one of his years, experience and intelligence, and without any negligence on his part, appellant negligently ran the automobile which she was driving, against and over appellee, thereby injuring him, for which injuries he alleged \$5000 damage. Appellant filed the general issue.

The evidence shows that appellee lived in the city of Tecumseh, in Lincoln county; that he was fourteen years old on December 18, 1932; that the accident occurred on June 14, 1933. Appellee had graduated from the eighth grade in school. On the day of the accident, he was riding a bicycle north on Main street, and along the west side of said street. This street is paved with concrete from curb to curb. As appellee proceeded north along the west side of said street, he approached an intersecting street, which ran east and west, known as Fourth street.

Appellant was driving her automobile south upon Main street, toward the point of intersection of Main and Fourth street. She was operating her automobile upon the west side of Main street, and traveling south toward the intersection thereof with Fourth





street. Appellee stated that he was a bicyclist and was riding his bicycle south on Main street, as he was riding his bicycle on the said street. When appellee reached the intersection of Main and Fourth streets, he turned his bicycle west into Fourth street. Fourth street was an improved street paved with macadam and sixty feet wide from curb to curb. The evidence shows that appellee went on his bicycle north upon the west side of Main street and toward the intersection thereof with Fourth street, and that when he reached the intersection, rode his bicycle out into Fourth street where the collision occurred with appellant's car. The evidence of appellee's witness, disclosed that the collision between his bicycle and appellant's automobile, occurred on Fourth street about twenty feet west from the west curb line of Main street and about six or eight feet south of the north curb line of Fourth street.

The appellee testified a brown leg. He states that he had been riding a bicycle for about four years. He admits that he saw appellant's automobile coming toward him from the north, and approaching the Fourth street intersection, but thought it would continue on south. The accident happened about eleven o'clock in the morning; the weather was clear and the streets were dry.

The evidence on the part of appellant discloses that she was operating her automobile south along Main street, and when she came to the intersection of Main and Fourth streets, that she turned her car west on Fourth street; that appellee came from the south side of Fourth street, and that his bicycle struck the left side of her automobile just back of the bumper. He states that she stopped her car in about the length thereof; that when the bicycle struck the left front fender, it threw the appellee over in front of the automobile and that his bicycle went under the car from the side. Appellant examined the car and found a dent in the left front fender where it is claimed the bicycle collided with the automobile. Appellant testified that the automobile was in first class mechanical condition. He first drove the car in 1914.



She testified that she saw appellant's car  
to this verdict. Appellant, however, testified  
the automobile belonged to her and that she  
from appellant, a fact which appellant testified  
to his father-in-law, he had knowledge of the  
last time of appellant's life and a clear  
was not in contact with appellant. Appellant  
was in contact with appellant's father, and it is  
title of this case.

There are only two witnesses who testified  
other than appellant and appellee. Appellant's father  
and on appellant's law, she testified that she  
in a cell, however, admitted that she  
crossed it, he testified to certain facts  
follower: that a police officer who bicycled  
walk on the west side of the street and  
section of said north street; that appellant  
her automobile around the corner of  
Fourth street; that the view was unobstructed  
a clear view of the intersection with  
appellant; that appellant proceeded north  
the intersection, the road with north street,  
his speed, and that his bicycle directly  
mobile of appellant, about two feet back  
striking the left front fender; that  
car of the north half of fourth street  
ed the point of collision from appellant's

Appellant urges various grounds for reversal of this  
cause. We do not find it necessary to consider each  
reasons, namely that the verdict of the jury is contrary to the  
evidence. The evidence offered to show no license on the part of  
appellant in the operation of her automobile at the time and place  
of the collision, consisted in the claim of appellee that appellant  
did not turn her car west into fourth street until after she had







STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 6057

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BE IT REMEMBERED, that afterwards, to-wit: On  
JUL 12 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

May Term, A.D.1934.

Alexander Lumber Company,  
a corporation,  
Appellant

vs.

John C. Coberg, Board of Education,  
School District No. 46, DuPage  
County, Illinois, et al.,  
Appellees,

and

Hammerschmidt & Franzen Company,  
a corporation, (Intervening Petitioner)  
Appellant.

Appeal from Circuit Court  
of DuPage County.

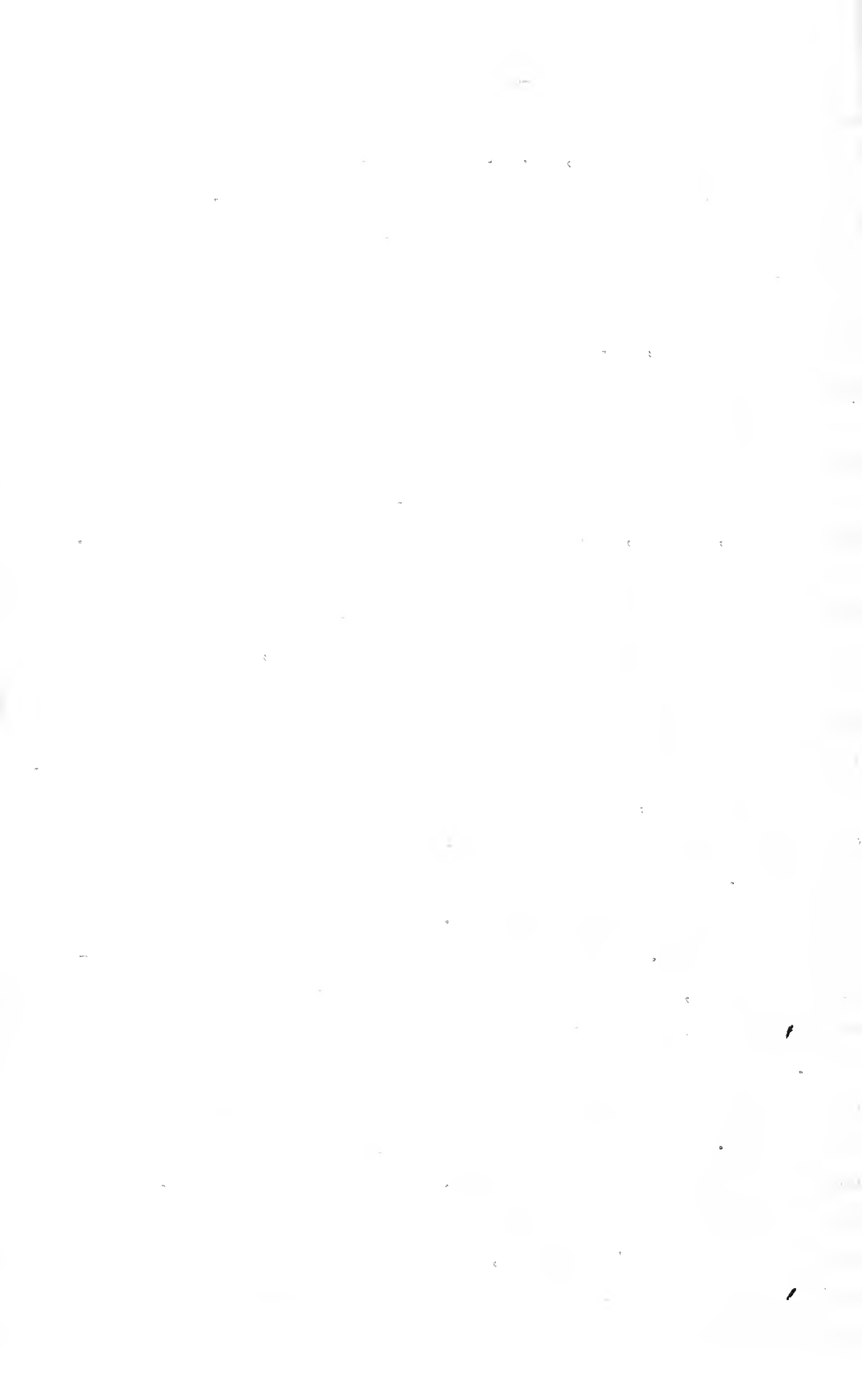
DOVE-J.

The facts in this case as they appear from the opinion of the Supreme Court are as follows: The board of education of school district No. 46 in DuPage County entered into a written contract with John C. Coberg for the construction of a school building referred to as the Washington School for the sum of \$93,810.00. Subsequently another written contract was entered into by the same board with Coberg for the erection of an addition to another school building known as the Hawthorne School, the contract price being \$27,275.00. Coberg sub-let a portion of the contract for the Hawthorne School to W.C. McDonald, but McDonald abandoned his verbal contract and the work, as provided by that contract, was finished by Coberg, who had over-paid McDonald. Prior to the abandonment of his contract with Coberg, McDonald entered into a verbal contract with the Hammerschmidt and Franzen Company, for the required mill work for an agreed price of \$2050.00, upon which there remained a balance due of \$1433.33 at the time this proceeding was instituted. In September 1929 the Hammerschmidt and Franzen Company served a notice of claim for lien on the funds remaining in the possession of the school board, which, at that time, had in its possession a balance of \$2,062.17 due Coberg under his contract for the erection of the Hawthorne School. In May 1928 Coberg, by his written contract, sub-let



to McDonald a portion of the contract for the construction of the Washington School for \$22,035.00. McDonald, although over-paid under this contract, abandoned the same and Coberg finished it. Shortly after the making of the McDonald contract, he, McDonald entered into a verbal contract with the Alexander Lumber Company for the building material needed in both the Washington and Hawthorne Schools and under these contracts \$2,148.67 remains due the Alexander Lumber Company and notices for claims for liens for the funds in the possession of the School Board remaining unpaid to Coberg were directed to the Board of Education and served upon its secretary. In September 1929 the Board had in its possession a balance of \$1869.46 due Coberg on the Washington contract, and \$2,062.17 due him on the Hawthorne School contract. After all of the materials had been delivered by the Alexander Lumber Company to McDonald for both school buildings, Coberg verbally promised to pay the Alexander Lumber Company therefor, the consideration for this verbal promise was that the Alexander Lumber Company would take no further steps for the enforcement of its claim of lien against the funds then remaining in the hands of the school board and due Coberg.

On September 4, 1929 the Alexander Lumber Company filed its bill of complaint making Coberg, McDonald, the Board of Education of School District No. 46 and the Pittsburgh Plate Glass Company defendants, seeking to enforce its claim of lien. The Hammerschmidt and Franzen Company intervened. Coberg answered the original bill and the intervening petition, insisting that the Alexander Lumber Company was not entitled to a lien upon the funds in the possession of the School Board. The School Board filed an answer and a petition in the nature of a bill of interpleader, and was dismissed from the proceeding upon paying \$3931.63 to the Elmhurst State Bank, there to remain impounded until the further order of the court. McDonald was defaulted. The cause was referred to the Master and a decree was subsequently entered sustaining the Master's findings, which held that appellants were not entitled to a lien and that the court had no jurisdiction to enter a personal judgment against Coberg for the balances remaining due the



Alexander Lumber Company upon its several contracts and the amount due Hammerschmidt and Franzen upon its contract. The decree dismissed the bill and the intervening petition of Hammerschmidt and Franzen for want of equity and directed that the money deposited by the School Board in the Elmhurst State Bank be paid by the Elmhurst State Bank to Coberg.

From this decree an appeal was prosecuted to this court, which reversed the decree of the trial court and remanded the cause with directions to enter a decree holding the Alexander Lumber Company and The Hammerschmidt and Franzen Company entitled to a lien upon the monies to the extent of their respective proven claims. This court granted a certificate of importance and certified the cause to the Supreme Court where the judgment of this court was reversed and the cause was remanded to this court for a consideration of the question of the personal liability of Coberg. Alexander Lumber Company vs. Coberg, 356 Ill. 49.

It is now insisted by the Alexander Lumber Company and Hammerschmidt and Franzen Company, appellants herein, that even though they are not entitled to assert a lien under Section 23 of the Lien Act, yet the lower court having acquired jurisdiction of the subject matter, being the funds now held in the Elmhurst State Bank under the directions of the trial court, and that court also having acquired jurisdiction over the parties who claim said funds, it therefore became its duty to adjudge, in this proceeding, the equities of all the parties having an equitable interest therein; that appellants furnished the materials that went into the school buildings and these materials not having been paid for, they have, in equity, a lien upon the consideration which was to be paid the contractor, Coberg, for such improvement, especially since Coberg had promised appellants to pay for the materials that they had furnished. In support of this contention the case of Newhall v. Kostens, 70 Ill. 156 is cited. It appears in that case that Newhall, the owner of certain premises, entered into a contract with Woolacott to erect a certain building. Woolacott sublet the brick work to Reinhardt, who never completed his contract with Woolacott and Woolacott was compelled to finish it at his own expense. Other parties who had performed labor or furnished materials to Reinhardt had served notices on Newhall, claim-

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ing a lien for the sums due them under the Mechanic's Lien Law then in force. Some of these had commenced proceedings to foreclose their liens and others had threatened to do so, whereupon Newhall filed his bill of interpleader, alleging the foregoing facts and averring that there still remained in his hands \$399.52, which is claimed by both Woolacott and Reinhardt. The bill made Woolacott, Reinhardt and all other parties who claimed the fund or any part of it or who insisted upon having their claims satisfied out of his property, defendants, and sought to have them interplead and settle their rights to the funds in the hands of complainant. A demurrer to the bill was interposed and sustained by the lower court, and the bill dismissed. The Supreme Court in reversing the decree stated that if no one other than Woolacott and Reinhardt were interested in the subject matter of this litigation, it would be strictly a case where a bill of interpleader would lie, that there was only one fund in controversy and in that Newhall had no interest, but was anxious to pay it to whom it is in law due and sought the aid of the court to determine that question. The court called attention to the fact that the bill alleged both Woolacott and Reinhardt claimed the fund and held that those defendants who furnished labor and materials to the subcontractor Reinhardt were not, under the Lien Act as it then existed, entitled to a lien therefor, but that complainant had a clear right to file a bill against Woolacott and Reinhardt and make all parties interested in the funds parties and that the Court, having obtained jurisdiction, could then ascertain to whom the moneys belonged and decree accordingly. This case is not authority for the proposition that in this proceeding it was the duty of the lower court to adjust the equities of the several parties who claim this fund, the effort of appellants to establish a lien thereon having failed. Under the Statute as it then existed, Reinhardt had a lien and he was claiming the fund. In the instant case, neither appellant has a lien. The statutory relief they sought by their respective bill and intervening petition was denied them. There existed no authority to grant them the relief asked, and all

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that was left to be ascertained and adjudicated were legal rights and the lower court very properly declined to take jurisdiction for that purpose.

Independent of any statute, a personal decree is not authorized in this state where an unsuccessful effort to establish a lien has been made. *Turnes v. Brenlecke*, 249 Ill. 394. In that case the court had under consideration an amendment to the Lien Act, effective July 1, 1903, which provided as follows: "And in event that the court shall find, in any proceeding in chancery, that no right to a lien exists, the contractor shall be entitled to recover against the owner as at law, and the court shall render judgment as at law for the amount which the contractor is entitled to, together with costs in the discretion of the court", (Hurd Statutes, 1903, Chapter 82, Sec. 13). In the course of its opinion the court said that this amendment was manifestly intended to give the court the power to enter a personal decree under circumstances where no such power existed before. In holding the amendment unconstitutional because it was special legislation and deprived a defendant of the right to a trial by jury, the court said: "If a Statute were passed providing that simple contract creditors of a certain class might file a bill in chancery and procure a personal decree for the amount due, it could hardly be contended that such an act was not unconstitutional both because it only applied to one class of creditors and for the reason that it deprived the debtors of a right to a trial by jury. \* \* \*

The right of trial by jury in respect to matters wherein such right existed at the time the constitution was adopted can not be taken away, directly or indirectly, by transferring the jurisdiction to try purely legal cases to a court of chancery, where, according to the usual practice, juries are not demandable as a matter of right. A party who directly invokes the jurisdiction of equity thereby waives his right to demand a jury, but such action on the part of the plaintiff can not deprive the defendant of his right to a jury trial."

By its bill, the Lumber Company, and by the intervening petition of Hammerschmidt and Franzen, appellants sought to have ascertained and paid to them what they conceived to be their statutory liens. There is



nothing in the allegations of the bill of complaint or in the intervening petition which can be said to appeal to the conscience of a court of equity. The money in the hands of the bank is due Coberg under his contract, which was completed to the satisfaction of his employer. The subcontractor, McDonald, abandoned his contract and Coberg was compelled to finish the work undertaken by McDonald, although McDonald had been overpaid by Coberg for the work he had done. There was no privity of contract between appellants and Coberg. Appellants sold nothing to Coberg but their contracts were with McDonald. Appellants made an unsuccessful attempt to establish a lien upon the fund due under the original contract and we hold that they are not entitled to receive indirectly what they were unable to secure under the statutory provisions which formed the basis of this proceeding.

In the brief filed by counsel representing appellants, it is said that there were two remedies which they might have pursued, one was to sue McDonald in assumpsit and the other to proceed under Section 23 of the Lien Act and endeavor to assert a lien against the funds due from the Board of Education to Coberg. The Lumber Company chose the latter and instituted this proceeding. Under the law, it had no lien which it could assert and under the authorities, where no equitable relief can be granted, it is proper to dismiss the proceedings and leave the complainant to pursue his legal remedies. There was therefore no error in the decree of the trial court dismissing the original bill and the intervening petition for want of equity and directing the depository, the Elmhurst State Bank, to pay the funds in its hands to Coberg.

The decree of the Circuit Court is affirmed.

DECREE AFFIRMED.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





## AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 306'

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BE IT REMEMBERED, that afterwards, to-wit: On

" 12 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



In the Appellate Court of Illinois

Second District

February Term, A. D. 1933

Paul H. Trimble, Admr. of  
the Estate of Trurie Trimble,  
deceased,

appellee,

vs.

Appeal from the Circuit Court  
of Whiteside County

Aubrey C. Sturtevant, Admr. of  
the Estate of Clayton R. Johnson,  
deceased,

appellant,

Huffman - J.

The appellee herein will hereinafter be referred to as plaintiff and the appellant as defendant. On June 25th, 1931, plaintiff was then engaged in driving his automobile upon state highway number 3, from Moline, Illinois, to Hillsdale, Illinois. Said highway was a concrete highway with a black line down the center thereof, which served as the distinguishing mark between the two traffic lanes. Plaintiff's intestate, Trurie Trimble, was his wife and was then riding in the automobile with plaintiff. Defendant's intestate, Clayton R. Johnson, was engaged in driving his automobile west upon said highway from Hillsdale toward Moline. It was about 9:00 or 9:30 o'clock P. M. The car then driven by plaintiff and that driven by defendant's intestate collided, killing both plaintiff's intestate and defendant's intestate.

Plaintiff qualified and brought suit under the Injuries Act, against defendant as administrator of the estate of the said Clayton R. Johnson, deceased. The trial resulted in a verdict in favor of plaintiff in the sum of \$4000, upon which judgment was rendered, and from which judgment the defendant has prosecuted this appeal.

The evidence can scarcely be said to be in dispute. Parties who came upon the scene of the accident immediately after the



occurrence of same, stated that the car driven by defendant's intestate had crossed over the black line in the center of said pavement and had collided with the automobile then being driven by plaintiff. The position of these cars was physical evidence of the place and manner in which they had collided. We have examined the various contentions of the defendant, urged for reversal of this case. We do not consider any of them of sufficient probative force to justify a reversal, except those urged against the instructions given for plaintiff.

Plaintiff had eight given instructions of which numbers 2 and 3 had to do with the amount of damages. Numbers 1, 4, 5, 7 and 8 were purely in the abstract. Without a discussion of these last named instructions, we are of the opinion that they should not have been given as they did not tend to enlighten the jury, but only to confuse them. The purpose of instructions is to inform the jury upon the rules of law applicable to the facts which the evidence fairly tends to prove. *Down v. Comstock*, 318 Ill. 445. An instruction composed of an abstract proposition of law may correctly state the law, however it should be drawn so as to be applicable to the facts as they are established by the evidence in the particular case on trial. Instructions in the abstract tend to invade the province of the jury. Those offered in this case did not relate to the time and place of the accident, and were without any apparent reference to the evidence presented. They merely stated abstract principles of law, sharply emphasizing the general rights of plaintiff. Such instructions are calculated to mislead and confuse the jury. *Garvey v. Chicago Ry. Co.* 339 Ill. 276.

Instruction number 6 instructed the jury that if they believed the plaintiff had proven his case as set forth in his declaration and that Clayton R. Johnson was guilty of negligence as charged in



the plaintiff's declaration, that they should find the defendant guilty. There is no instruction given for plaintiff which tells the jury what negligence the defendant was charged with in plaintiff's declaration. It is not to be presumed that the pleadings were taken by the jury when they retired to consider their verdict. Benier v. I. C. R. R. Co. 296 Ill. 464, 472; Lerette v. Director General of Rys. 306 Ill. 348, 355. An instruction which directs a verdict, must limit the jury to the negligence charged against the defendant in the declaration. Herring v. C. & A. R.R. Co. 299 Ill. 214; Malloy v. Chicago Rapid Transit Co. 355 Ill. 164, 171; Ratner v. Chicago City Ry. Co. 233 Ill. 169.

For the errors indicated, we feel compelled to reverse and remand this cause, and the judgment of the circuit court of Whiteside County is therefore reversed and this cause remanded to that court.

Reversed and remanded.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



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## AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

276 I.A. 606<sup>2</sup>

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On

JUL 12 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

People of the State  
of Illinois,

Defendant in error,

vs.

Error to County Court of  
Du Page County

Fred C. Albrecht,

Plaintiff in error,

Huffman - J.

Plaintiff in error was convicted in the county court of Du Page County, for alleged violation of the Medical Practice Act. He made no denial of the acts charged, but sought to defend against same under Section 21 of the Act, Canill's St. 1933, Ch. 91, Par. 22, which section exempts any person from the act who renders services in case of emergency, and when no compensation is paid therefor.

The plaintiff in error was found guilty by a jury and a fine of \$150 assessed against him. He brings this writ of error to review that judgment.

Plaintiff in error was charged with attending one Ida Bloomberg at time of childbirth. The facts are not in dispute as the plaintiff in error admitted performing the services as charged. Plaintiff in error was not licensed to practice medicine during any of the time in question. He had been employed in a sanitarium in Chicago for about seventeen years. He had been working for Dr. Crane at his sanitarium in Elmhurst, in Du Page County, for four or five years prior to this case. On May 29th, 1933, he received a telephone call at Dr. Crane's office to the effect that Mrs. Bloomberg was about to be confined. Dr. Crane was not in town. The plaintiff in error placed a call for Dr. Crane at Diamond Lake, and took his medicine



bag and equipment and went to the home of Mrs. Bloomberg. He arrived there about two or three o'clock A. M. on the morning of May 30th. Mrs. Bloomberg was then in labor and about to be delivered of a child. Plaintiff in error rendered services as an attending physician and made delivery of the child. It is his contention that he went to the home of Mrs. Bloomberg expecting Dr. Crane to answer the telephone call, and that after arriving there the services he performed were brought about by an existing emergency. Plaintiff in error's contention might be sustained to this point, but the evidence of the nurse is that he called daily for a week or ten days following the birth of the child to administer after-treatment. This is not disputed by the plaintiff in error.

Plaintiff in error contends that the court erred in the giving of an instruction and that the corpus delicti cannot be established by the admissions of the accused alone. Not only did plaintiff in error by his own statement admit the rendering of the services as charged, but the same were proven by Ida Bloomberg and by the nurse who was in attendance at the time. This was sufficient to establish the corpus delicti independently of the admissions of the plaintiff in error. There was no evidence in this case tending to raise any question of doubt as to the rendering of the services by the plaintiff in error as charged. His sole contention was that they were rendered under such an emergency as would exempt him from the force and effect of the statute. This contention is not well taken in view of the fact that he administered after-treatment each day for more than a week. "The object of the review of judgments of trial courts is not to determine whether the record is free from error, but is to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, after a trial in which no error has occurred which might be prejudicial to the defendant's rights. A defendant who is fully proven guilty by his own confession, has no





right to complain of error in the trial where the verdict of guilty has nothing to do with the fixing of the penalty or the grade of the crime." People v. Schueneman, 320 Ill. 127, 135. People v. Nusban, 326 Ill. 519, 528.

After a consideration of the record in this case, we find no error justifying a reversal of the judgment. The judgment of the trial court is therefore affirmed.

Judgment affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



8615

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

27614 3023

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On  
JUL 12 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1933.

John Kenney & Sons Contracting  
Company, Incorporated,

appellee

v.

Appeal from the Circuit Court  
of Whiteside County.

P. A. Whitney, Sheriff of Whiteside  
County, Illinois,

appellant.

PER CURIAM.

John Fabick Tractor Company recovered three judgments against John Francis Kenney, in the Circuit Court of Whiteside County, aggregating \$3075.00, upon which executions were issued in August 1931. Acting under these executions, the Sheriff levied upon the property in controversy in this proceeding and advertised the same for sale. On September 11, 1931 this suit was instituted and the property in controversy replevied and delivered to plaintiff below, appellee here. The declaration was in the usual form, alleging that appellee is the owner of the property in controversy and entitled to its possession and that the defendant wrongfully took and unjustly detains the property under executions issued against John Francis Kenney. Pleas of non cepit, non detinet and property in John Francis Kenney against whom appellant held executions were filed, and also an additional plea of null tiel corporation in which it was averred that there is no corporation by the name of appellee. Upon these pleas issues were joined and a jury having been waived, the cause was submitted to the court for determination, resulting in a finding and judgment in favor of appellee, from which this appeal has been prosecuted.

Notwithstanding the fact that appellee has not appeared in this court or filed a brief and argument in support of the judgment of the trial court, we have examined the record and note that appellant insists that the trial court erred first, in overruling appellant's motion for





a continuance; second, the defendant's belief that he was in its holdings upon propositions of law and fact; and third, the denial of appellant's right to a new trial. The record on appeal is upon the ground of newly discovered evidence.

Inasmuch as, under our rules, the defendant's motion for a new trial, which will need to be considered, is unnecessary to examine the first or third propositions of law. It is noted, however, that since the case was heard by the court, a judgment of ouster has been rendered by the Circuit Court of Cook County in a certain quo warranto proceeding instituted by the State of Illinois upon the relation of J. J. Smith, then Secretary of State, against John Kenney, John J. Kenney, Carl J. Kenney and Joseph J. Kenney, prohibiting them from exercising the functions, powers, privileges and franchises of a corporation under the name of appellant.

In the absence of an appearance upon the part of appellant, we deem it inadvisable to review the evidence or pass upon the errors assigned with reference to its admission or rejection or upon the holdings of the Court, either as to propositions of law or fact, so many of the questions which arise upon this record may not arise upon a rehearing.

The judgment of the trial court is reversed and the cause remanded.

REVEREND JUSTICE.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



8821

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. COR<sup>4</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
AUG 3 - 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

May Term, A. D., 1934.

WALTER RODHOLM,  
(Plaintiff) Appellee,

vs.

Appeal from  
Circuit Court,  
Kane County.

GEORGE O. ASHMAN,  
(Defendant) Appellant.

WOLFE -- P. J.

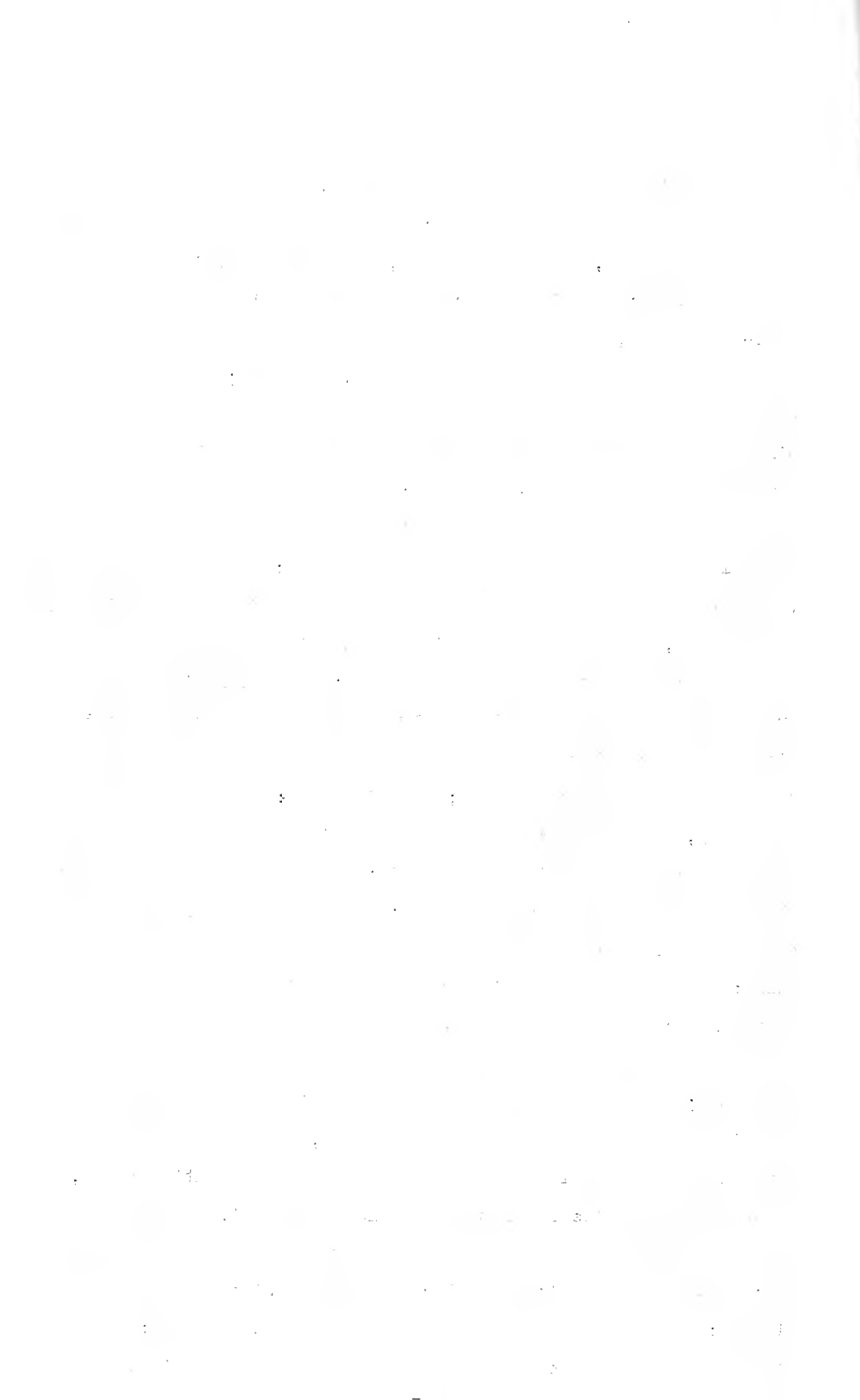
Walter Rodholm, the appellee, started suit in the Circuit Court of Kane County, against the appellant, George Ashman, for damages alleged to have been sustained by him in a collision between their automobiles on a public highway known as State Highway No. 58, in Cook County, Illinois. The declaration consisted of five counts and on motion of the plaintiff, the fourth and fifth counts of the declaration were dismissed leaving counts one, two and three. The first count charged the defendant with general negligence. The second count charged that the defendant negligently drove his automobile to the left of the center line of the highway, and because of such negligence, he caused the injury to the plaintiff. The third count charged the defendant with negligently operating his automobile at an excessive rate of speed, and by reason of such negligence, he caused the injury to the plaintiff. The defendant filed a plea of the general issue. The case was submitted to a jury. The verdict resulted in favor of the plaintiff for the sum of \$500.33. Upon this verdict judgment was rendered. The defendant brings the case to this court for review by appeal.

The plaintiff testified that, he lived on a farm eight miles east of Elgin and that early in the morning of September 7, 1930,





he was driving his automobile on Route 58, which is a state highway extending from Elgin to Evanston; that said highway was paved with a cement pavement, twenty feet wide, to a point within about three miles of Elgin; that he was driving alone in a '29 Chevrolet four-door sedan, which he had purchased about ten or eleven months previous and had driven about 17,000 miles; that at a point on said highway about five miles east of Elgin there are two small hills about one mile apart and that between said hills there is a level space of about one-half mile; that there is a farm referred to as the Krog farm on the north side of the highway near the easterly one of the two hills above mentioned; that as the plaintiff (appellee) arrived at the top of the westerly of the two hills above referred to, he saw the car of the defendant (appellant) coming over the hill about one mile to the east; that plaintiff was driving on the south, or right half of the cement pavement with his left arm resting on the window sill of the open window in the left front door of his car; that it was 1:30 in the morning of Sunday, September 7; that he had his dimmers lighted and with those lights he had driven from Elgin; that he could see ahead on the pavement approximately 200 feet; that he had a collision that night approximately 500 feet west of the Krog farm between the two hills; that he did not notice anything peculiar about the car approaching; that he noticed it coming over the hill and as it approached he did not pay any more attention to it than to any other car; that it was close to the black line and he noticed that when it was about 100 to 150 feet from him, it was not over the black line at that time and he did not pay much attention to it, but as the car came closer and to within 15 to 20 feet, it made a sudden change and came directly at him and hit the left front side of his car; that it hit the front fender and door on side on which he was sitting; that was all he remembered as he was unconscious; that at the time the cars came together his car was on the right half



of the pavement; that the other car was over on his side and hit the left side of his car. That the plaintiff (appellee) was traveling about 40 miles per hour and that he did not remember anything that happened after the cars collided; that George Ashman was driving the other car; that he had a conversation with George at the hospital on September 12; that when he entered the room, George said: "So you are the fellow I hit"; that his car was damaged beyond repair and his left arm was broken between the elbow and shoulder; that he was taken to the Sherman Hospital for treatment and was there until September 12; that he had other slight injuries; that his hospital bill was about \$56; nurse bill, \$5; Doctor's bill, \$44.50; expense for X-rays, \$15 and clothing, \$12; that the Ashman car was traveling between 50 and 55 miles an hour at the time of the collision.

On cross-examination, Rodholm testified that the night before he got to bed at 12:00 o'clock and went to work for the Chanson Heater Company at Carpentersville, Illinois, at 7:00 o'clock Saturday morning and worked until noon; that he lived about seven miles from Carpentersville; in the afternoon and evening he worked at the Penney Store in Elgin until 9:00 o'clock; that he left the store about 9:15 or 9:30 and drove to McHenry which he stated was 15 or 16 miles from Elgin and attended a dance; that he then drove back to Elgin and on out on the Evanston road where the collision occurred on his way home; that he was approximately one-half mile from the car Ashman was driving when he first saw it; that from the time when he first saw the Ashman car, until the collision occurred, it went approximately 1,000 feet.

Howard Hoagland, a witness for plaintiff was a motorcycle policeman, who lived in Elgin and rode Route 58 from Elgin to the intersection of said road with the Higgins road, which includes the point where the collision occurred. He testified that he went to the scene of the accident on the morning of September 7 about



2:00 o'clock; that the two cars involved, the Chevrolet belonging to Rodholm and the Studebaker belonging to Ashman, were still at the scene of the accident; that both cars were sedans; that the Studebaker would weigh from 4300 to 4400 pounds and the Chevrolet around 2500 pounds; that prior to that date he was not acquainted with Rodholm; that he knew Ashman by sight; that Route 58 was paved with cement 20 feet wide, with a black line down the center; that the Chevrolet was on the south of the road facing northwest, with front wheels partly on the pavement and the hind wheels on the shoulder; that the Studebaker was 50 or 60 yards west toward Elgin on the right-hand side of the road, in the ditch; (that would be the north side of the road.) That it was headed towards the pavement, partly down in the ditch; that the Chevrolet car was wrecked; that he inspected it with a flashlight and there was around and under the car pieces of metal; that one of the doors of the Studebaker was off completely and the top was caved in; that it was pretty well wrecked. He picked up the door of the Studebaker lying on the shoulder of the road possibly 40 feet further west of the car itself; that he looked for marks on pavement, as well as he could with a flashlight, where he figured would be the spot where collision occurred, judging that by where the Chevrolet was standing; that there was oil and grease all over the pavement near the front of the Chevrolet on the south side of the black line; that he saw a gouge or scrape in the pavement in front of the Chevrolet on the south side of the black line; that on the Rodholm car there was a rim mark imprinted on its left side on the cowl below the end of the windshield.

The evidence of S. L. Boeman was to the effect that the Chevrolet car prior to the accident was worth \$425.

Upon cross-examination the witness stated that the Ashman car apparently went down the road and off to the right and then whirled halfway round; that he believed the Ashman car had turned over; that the top was caved in; that there were marks all the way



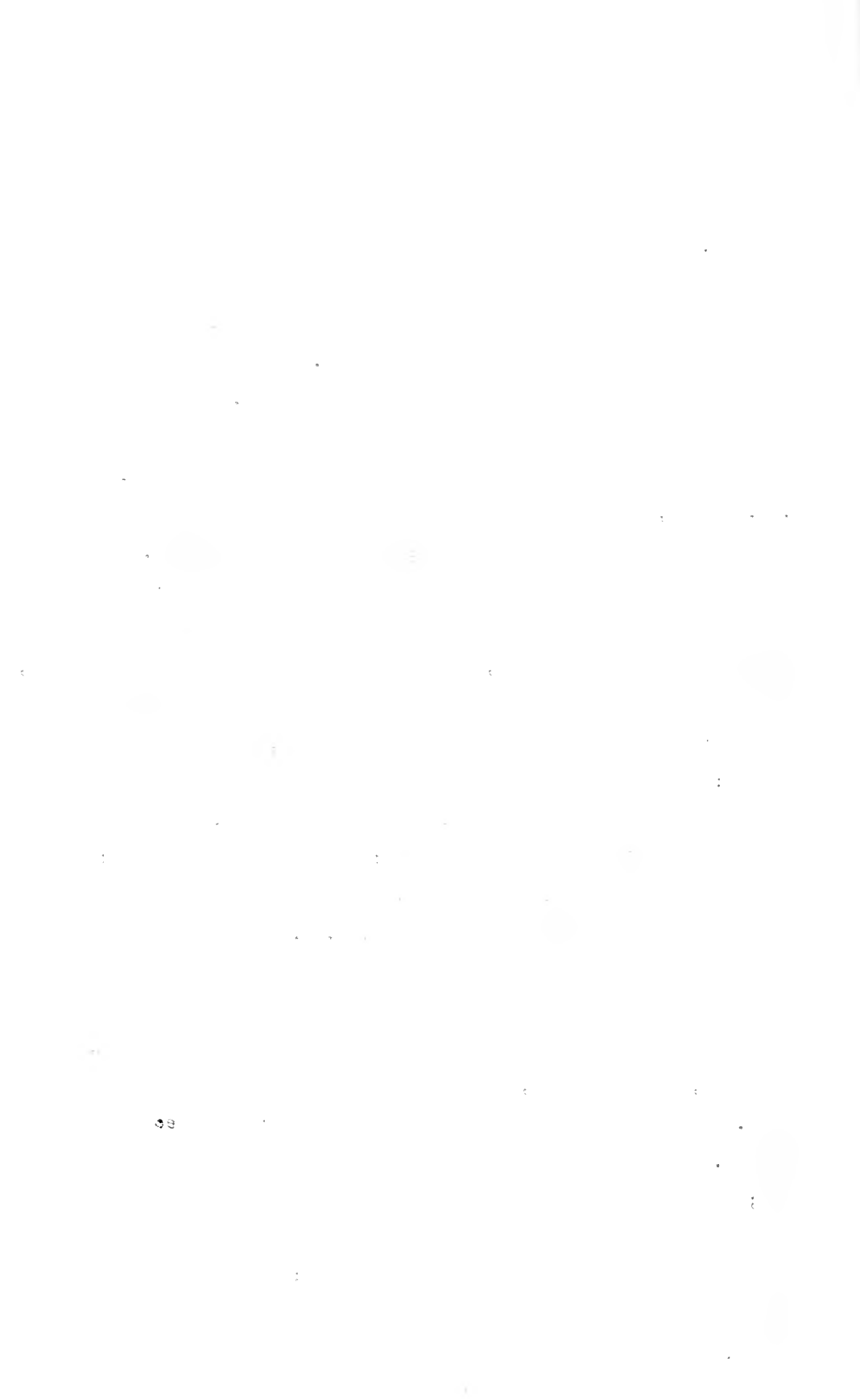
to where it had gone off in the ditch; that it looked like it had turned over at least once; that the front wheels of the Ashman car were not up on the pavement, but were up out of the ditch on the shoulder.

On re-direct examination he stated that he did not see any marks on the pavement which the Studebaker had made. The marks he referred to were in front of the Chevrolet.

The plaintiff introduced five photographs. Three were of the plaintiff's car and two of the defendant's car showing the damage that was caused by the collision to each of the cars.

S. L. Boeman, witness called on behalf of the plaintiff, testified to the damage that was caused to the car of the plaintiff.

The defendant testified in his behalf as follows; that he was twenty-four years old<sup>and</sup> at the time of the trial he was employed by Swift & Company, meat packers; that prior to September 6, 1930, he had been employed by the State of Illinois, Division of Highways; that on the afternoon of September 6, he worked until about 2:30 and then went home and took his trunk to the train to be shipped to Purdue University, LaFayette, Indiana, where he was attending school, and then took a nap; that he got up about 5:30 and he and his brother, Bert Ashman, and Vivian Wolff took the Studebaker car belonging to his father, O. B. Ashman, and went to Evanston where they picked up another young lady and the four attended a dance in Chicago; that they returned to Evanston about 1:00 o'clock and after leaving the young lady who lived in Evanston, the three, George Ashman, Bert Ashman and Vivian Wolff started for Elgin. All three were riding on the front seat; that George was driving. Bert was sitting on the right side and Miss Wolff between them; that when he reached the top of the hill near the Krog farm he saw the Rodholm car coming from the west over the other hill; that he was driving about 40 or 45 miles per hour; that at the time he first saw the Rodholm car it was about one mile away; that he, Ashman, was driving on the north side of the black center line of the





pavement; that his left wheels were approximately two feet north of the said center line and that he did not change his course while he was driving along on the road westerly with reference to the black center line of the pavement; that the lights on his car were bright and he had a spotlight in the middle of the windshield directed to the northerly edge of the pavement; that as he proceeded down the hill he signalled and then turning on his bright lights again to get Rodholm to dim his lights; that the Rodholm car was traveling adjacent to the black line nearly on top of it as he approached from the west; that he could see the position of the Rodholm car with reference to the black line approximately three-quarters of a mile; that as he proceeded toward the west and got to the bottom of the hill, the Rodholm car made a decided turn toward the north and he, Ashman, applied the brakes, yelled, and turned the wheels toward the north, and that is the last he remembered; that the distance between his car and the Rodholm was approximately 200 feet when he applied his brakes; that Ashman did not at any time after his car approached the Rodholm cross the center line of the pavement; that the Studebaker car had two-wheel mechanical brakes on the rear wheels, which were in excellent condition. He was taken to the Sherman Hospital and did not regain consciousness for several days after the accident.

Elsie Westby, called as a witness on behalf of the appellant testified that she was acquainted with George Ashman; that on September 7, she was returning from Chicago to Elgin about 2:00 o'clock with Richard Peck in an automobile and that they were the first to arrive at the scene of the accident; that she saw headlights of the cars before the accident; that she saw glass on the pavement when they arrived at the scene of the accident and that she saw black lines on the pavement on the north side or right side of it as she was going west; these lines were two or three feet from the black line in the center of the pavement and was some distance west of the plaintiff's car; that they drove up and stopped in



front of Ashman's car and saw where it was located; that it was quite a distance west of the scene of the accident; that she saw George Ashman there and Vivian Wolff was down in the ditch; that it was a bright moonlight evening and the pavement was dry.

C. E. Adams testified in behalf of the appellant that he was an instructor in the high school, and that he roomed upstairs in an apartment, in the house occupied by O. B. Ashman; that he heard of the accident to George Ashman about 2:00 o'clock the same morning; that he went to the scene of the accident about 3:00 o'clock; that Bert Ashman went with him; that the cars were still at the scene of the accident; that the Ashman car was on the north side of the pavement facing the south and the Chevrolet was on the south side of the pavement about 35 yards away from the Ashman car, off the pavement; that they made an examination of the pavement with a flashlight; that he found some tire marks which looked like the car had skidded; that he found some bruises on the pavement; that these black skid marks were north of the black line in the center of the road; that he remained at the scene of the accident for about a half hour and then went home; that he returned about 8:00 o'clock the same morning; that he observed the same marks on the pavement which he had observed on his first visit.

Vivian Wolff, called in as a witness, on behalf of the appellant, testified that she was riding with the appellant at the time of the accident; that she was dozing and did not know just what happened.

This is the substance of the evidence that was offered relative to how the accident occurred. The only question raised in this appeal is that the verdict is manifestly against the weight of the evidence. The appellant seriously insists that the weight of the evidence preponderates in his favor because of his own testimony and the corroborating facts and circumstances appearing



at the scene of the accident. An examination of the record discloses that the testimony of the plaintiff and defendant as to how the accident occurred is in direct conflict. Each claims that the other drove over the black line and on the wrong side of the road. If the testimony of these two witnesses was standing alone the Court could not say that the plaintiff had proven his case by a preponderance of the evidence. The record discloses that there had been a former trial of this case in which the parties were reversed and the now defendant was the plaintiff in the former trial and the now plaintiff was the defendant.

There are some variations in the testimony of Mr. Ashman at the time of the former trial and this trial which may have influenced the jury to decide in favor of the plaintiff. An examination of the record and photographs shows that the Chevrolet car driven by the plaintiff was damaged at the left front center; that three wheels were broken off and the car in this condition naturally went but a short ways after the accident. The glass and oil near the Chevrolet car found on the pavement indicates that the accident probably occurred at or very near where the Chevrolet car came to a stop. The Studebaker driven by the defendant proceeded westward at a distance of probably 100 feet before it came to rest. A door of this car was found 40 feet west of where the Studebaker was standing. The left front wheel was broken off of the car. If the defendant applied his brakes as he testified and then the car travelled 100 feet or more after the accident with his brakes set and one wheel off of his car the jury would be justified in believing that at and just prior to the time of the accident he was driving his car at an unreasonable rate of speed.

The trial court and jury had the advantage of seeing and hearing the witness testify and were in a much better position than a court of review to judge of the weight of the testimony of the respective witnesses. The jury had the advantage of seeing and



examining the photographs of the damaged cars. It was a question for the jury to decide whether the plaintiff or defendant drove over the black line in the pavement and caused the collision. This Court would not be justified in reversing the case unless the verdict of the jury is manifestly against the weight of the evidence. After considering the whole of the evidence and examining the photographs, we are unable to say that this judgment is manifestly against the weight of the evidence. We find no reversible error in the case and the judgment of the Circuit Court of Kane County is hereby affirmed.

Judgment affirmed.





STATE OF ILLINOIS,        }  
SECOND DISTRICT        } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, (the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 806<sup>5</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
AUG 3 - 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
October Term, A. D. 1932

GEORGE MARTIN,  
Appellee,

vs.

APPEAL FROM THE CIRCUIT

FIREMEN'S INSURANCE COMPANY OF  
NEWARK, NEW JERSEY, a Corpora-  
tion, THE GIRARD FIRE AND MARINE  
INSURANCE COMPANY, a Corporation,  
THE MECHANICS INSURANCE COMPANY  
OF PHILADELPHIA, a Corporation,  
and NATIONAL-BEN FRANKLIN FIRE  
INSURANCE COMPANY OF PITTSBURGH,  
PA., a Corporation,

COURT OF WILL COUNTY.

Appellants.

DOVE-J.

George Martin, the plaintiff below, appellee in this court, recovered a judgment entered on a verdict of a jury for \$1178.63, in an action of assumpsit brought against the defendants in the Circuit Court of Will County upon a fire insurance policy issued jointly by them.

There are thirty assignments of error on the record, and in their brief under the heading "Errors Relied Upon", counsel enumerate sixteen, but cite authorities and argue only five. It is a well known rule that errors assigned, but not argued, are abandoned or are to be treated as having been waived.

The declaration as amended alleged the issuance and delivery of the policy on July 19, 1928, and set forth the policy in haec verba. By its provisions appellants insured appellee in the amount of \$1500.00 on his stock of merchandise consisting



chiefly of groceries and dry goods while contained in the frame two-story building situated at No. 508 Williamson Street, Joliet, and \$500.00 on his store fixtures, shelving, counters, show cases and other property incidental to the business. The declaration as amended then averred that the property insured, of which appellee was the owner, was destroyed by fire on February 1, 1929, while the policy was in force, averred that the insured, after the fire occurred, gave immediate notice thereof in writing to appellants and on February 18, 1929 delivered to appellants a signed and sworn statement in compliance with the provisions of the policy as to making proof of loss, setting forth in the declaration what this sworn statement contained. The amended declaration then alleged that appellee had kept and performed all things in said policy on his part to be kept and performed, and concluded in the usual form. To this declaration appellants plead the general issue and five special pleas. To the fifth and sixth special pleas demurrers were sustained and appellants stood by these pleas and joined issue upon all other pleas.

Upon the trial, two special interrogatories were submitted to the jury, by one the jury found the amount of direct loss or damage sustained by appellee, to the furniture and fixtures insured, was \$500.00, by the other special interrogatory, the jury found the amount of direct loss sustained by appellee to his stock of merchandise was \$532.75. By their general verdict, the jury added to these amounts \$145.88 interest, making the total damages \$1178.63, and after overruling a motion for a new trial, judgment was rendered upon this verdict and the record is before us for review by appeal.

The first error insisted on and argued is that the Court erred in sustaining appellee's demurrer to the fifth and sixth special pleas. The fifth plea set up the language of the policy which provided that the entire policy shall be void if the hazard be increased by any means within the control or knowledge of the





insured and averred that before the time of the fire, and after the issuance of the policy, plaintiff kept intoxicating liquor on the premises, where the insured property was located, for beverage purposes, in violation of law, and such keeping of said intoxicating liquor was an increase of hazard within the control and knowledge of the plaintiff, by reason whereof, the plea concluded, said policy of insurance became void. The sixth special plea sets up the same provision in the policy, and alleges that the plaintiff sold intoxicating liquor on the premises, where the insured property was then and there located, for beverage purposes, in violation of law, and that the sale of the liquor was an increase of hazard within the control and knowledge of the plaintiff, and, therefore, the policy was void.

The increased hazard provision referred to in each plea is as follows, viz: "This entire policy, unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the control or knowledge of the insured." It will be seen at once there is nothing in the plea negating the fact that an agreement was indorsed on or added to the policy. Furthermore, neither of these pleas specify the time or times when the intoxicating liquor was kept or sold on the premises, the only allegations being, "That before the time of the fire and after the issuance of the policy," these things were done. Correct pleading would require each plea to contain an indefinite allegation as to when the liquors were kept and sold, and an averment that such keeping and such selling thereof, at that time, increased the hazard, and thereby voided the policy. We have read the authorities cited and in our opinion they do not sustain appellants' contention. It is well settled in this state that a temporary unauthorized use of property only suspends the operation of a fire policy, and when such use ceases the policy revives. In *Traders Ins. Co. v. Catlin*, 163 Ill. 256, it is said: "Though there be a



change of risk by reason of an increased hazard, which would avoid the policy if declared forfeited by the company, yet where the company has not declared the policy forfeited and the cause for the increased hazard no longer exists, and there is no increased hazard by reason of former changed conditions, then, the policy being for insurance for a certain period, the contract of insurance will be construed, and the fact determined whether there was an increased risk at the time of the fire which in any manner was conducive to the loss. If a loss occurs during the increased hazard, a recovery will be defeated. If a former increase of hazard has ceased to exist and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage. \* \* \* That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule. If the policy was rendered void by that act, that would have resulted even though it was in no way conducive to the loss." There was no error in sustaining the demurrers to the fifth and sixth special pleas.

The second and third errors relied upon will be considered together. Appellants contend that the trial court erred in not directing a verdict for them, insisting that appellee failed to prove that he gave immediate notice of loss in writing to appellants and failed to prove he rendered a sworn statement of proof of loss to appellants within sixty days next after the fire, as provided in the policy. The plaintiff testified that on the morning of the fire he wrote Cowling and Newton, 315 Will County Bank Building, Joliet, Illinois, giving the location of the property as 508 Williamson Avenue, and stating that the store stock and fixtures had burned and they should take care of it: that he put a stamp on it and



dropped it in a mail box in front of the store. It further appeared from the evidence that Cowling and Newton were the agents for the Keystone Underwriters Department, through whom the insurance had been effected. It is argued, however, that because it is not stated in so many words that the letter was placed in an envelope and the envelope properly addressed and stamped with the necessary postage, the proof is not sufficient to raise a presumption of its receipt by Cowling and Newton. We think the argument is devoid of merit when applied to the facts in this case. The plaintiff's testimony shows that the letter was written, stamped and dropped in a mail box.

Harry P. Kelley, a fire insurance adjustor acting for the Underwriters Adjusting Company, testified that this adjusting company handled the investigation of this fire and that for appellants he went out to the fire at 508 Williamson Avenue about 10:30 in the morning on the date of the fire.

It further appeared from the evidence that Cowling and Newton do business in Joliet and the fire having occurred there and the appearance of the adjustor at the fire a few hours after the notice was dropped in the mail box would indicate that notice of the fire had been received and acted upon by the agents to whom it was sent. In addition to this, on the question of notice, we have the testimony of Mrs. Rose Paul to the effect that she sent a notice to Keystone Underwriters, Chicago, through which the policy sued on was issued, on February 2nd or 3rd, 1929 and subsequently, on March 22nd, she wrote a letter to Keystone Underwriters Department at Pittsburgh, Pennsylvania, and enclosed sworn proof of loss. Without objection, this letter, written by her for Whitaker and Jackson, adjustors, was admitted in evidence and omitting the address and signatures is as follows, viz: "Owing to the fact that the assured George H. Martin, 508 Williamson Street, Joliet, Illinois; and your adjustor cannot agree to the amount of loss and damage, we are herewith filing proofs of loss in accordance with the conditions



in your policy contract, No. 68, in the amount of \$2000.00 expiring July 19, 1929". Upon the trial, appellants produced proofs of loss, which were identified by the defendants' witness Samuel Kart, as having been notarized by him for the firm of Whitaker and Jackson, the firm by which Mrs. Rose Paul was employed at the time she says the notice and proofs of loss were sent from and on behalf of that firm. We think the terms of the policy requiring notice and the furnishing of proofs of loss were complied with and that the proof thereof in the record was sufficient to justify the court in submitting the cause to the jury and warranted the jury in its finding.

It is next insisted that the trial court erred in not granting the motion of appellants to strike from the files the amendment to the declaration as amended and in refusing to vacate the order granting leave to file it. The record discloses that the original declaration alleged that appellee had immediately given written notice of the loss, furnished the required proof of loss and performed all the conditions and provisions of the policy sued on. Pleas were filed and the issues having been made up, a trial was commenced on October 19, 1931. While the trial was in progress a juror was withdrawn, the cause continued, and on October 24, 1931 an amendment to the declaration was filed, by leave of court, setting up acts of appellant which it was insisted constituted a waiver of the provisions of the policy which required immediate notice of loss. Subsequently there was a plea filed to the declaration as amended, a demurrer thereto overruled and thereafter the rule entered upon appellee to reply thereto was discharged and appellee filed by leave of court an amendment to his declaration as amended and by this last amendment appellee took the same position he had in his original declaration with reference to a compliance with the conditions precedent.

In support of this contention, appellant relies upon the case of *Drew v. Drew*, 271 Ill. 239. That was a chancery case. The





bill was filed December 8, 1913. An answer and cross bill were filed, amendments to bill and cross bill were made and answers were filed to the bills as amended. The cause was referred to the Master and on November 12, 1914 evidence was taken. On January 23, 1915 a rule was entered requiring the complainants to close their evidence by January 30th, the defendant by February 13th and the complainants their evidence in rebuttal by February 20th. On the first day of the March Term 1915, the defendant presented a motion for an extension of the time for taking evidence, but the motion was overruled. In its opinion the court says: "The denial of the defendant's motion for an extension of the rule for the introduction of her evidence before the Master has been assigned as error and is the only question material to be determined on this appeal". After discussing this question, the Court held that the defendant was entitled to an extension of the rule, and it is upon that ground that the case was reversed. It is true the question of the right to amend pleadings is discussed, but there is nothing said in the opinion to sustain the position of appellant in the instant case or from which this court can say that the lower court abused its discretion in permitting the amendment to be made.

The remaining point argued is that the testimony of the appellee as to the loss of \$200.00 on account of damage to the radio should have been stricken because it is claimed the radio was not covered by the policy. If it be conceded that the radio was not within the coverage, there is proof of more than \$500.00 damage and loss apart from the damage to the radio. That is the proof shows the loss regarding fixtures including the radio to be \$1,500.00, so that the proof of loss to fixtures if the radio be excluded exceeds by several hundred dollars the amount fixed in the verdict for loss on fixtures and the defendants were therefore in no wise injured, by the ruling of the court on this point.

Finding no reversible error in this record, the judgment of the Circuit Court is affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



53

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the first day of May, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 307'

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BE IT REMEMBERED, that afterwards, to-wit: On  
AUG 3 - 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

Hazel Peters,

Defendant in error,

vs.

Harold Reuter,

Plaintiff in error,

Error to the Circuit Court

of Peoria County

Dove - J.

Hazel Peters, defendant in error, brought this action against Harold Reuter, plaintiff in error, to recover damages sustained by her as a result of an automobile collision while she was riding in an automobile then being driven by plaintiff in error. The declaration alleged that the car was being driven in a northerly direction on State Route No. 29; that she was riding in the rear seat as a guest and exercising due care for her own safety; that considerable motor traffic was proceeding in both directions just before the collision and that by reason of the condition of the traffic and all surrounding circumstances, it required the driver to carefully control his automobile and drive it at a reasonable and proper rate of speed with regard for the traffic and use of the way. The declaration then avers that the plaintiff in error, with reckless indifference to the condition of the traffic and use of the way, then and there, with wilful and wanton misconduct, drove and operated the said automobile in which defendant in error was riding, as a guest, at a high and dangerous rate of speed, and failed to keep his automobile under control and that on account of such wilful and wanton misconduct the automobile in which she was riding ran into another automobile traveling in the opposite direction.









a car length and when it, the Reuter car, was not over a car length south of her car, she observed it traveling over the black line, which marked the center of the pavement, toward her car, and that was all she remembered. She also testified that she did not remember that her right wheels went off the pavement on the west side just before the collision.

Hazel Peters, the plaintiff below, testified that she was sitting in the rear seat on the right side of the Reuter car and heard Mrs. Reuter say to Harold after they left Peoria that she wished he would not drive so fast, because "we can't see anything, we have all evening to get there. There is no hurry". She further testified that no cars passed them, but that they passed all the cars they caught up with and that the Reuter car was going fifty-five to sixty miles per hour just before the accident. That she was not looking ahead but over the sea wall at the water, so did not see the Ferguson car prior to the collision. She further testified that just before the accident, the Reuter car gave a "sort of back swerve or swing and I don't remember anything after that".

Other than the testimony of the physicians who attended defendant in error, the foregoing was the substance of all evidence offered on behalf of the plaintiff below.

According to the testimony of Mrs. Catherine Reuter, the party left her home in Peoria at about a quarter till six o'clock and proceeded to Route 29, and only passed a few cars, as the traffic was very light. She recalled telling her son Harold once when they were a mile or so south of the point of the collision "not to hurry as we have plenty of time and would be there, (meaning their destination) before dark". The road was straight and one could see a mile or so ahead and no cars were on the right traffic lane, but she observed what proved to be the Ferguson car coming toward her car, and that the Ferguson car "skidded off the side of the pavement and turned back on and skidded over in front of us.



They were off on their right side first. The car in which I was riding was on the right side of the black line. It did not at any time cross over to the left of the black line in the center of the road. We stayed on the right side and they came over and we hit. That is about all I can say. We stopped about the time they hit us".

Etheline Sparks was also an occupant of the car and sat in the front seat between Harold and Mrs. Reuter and in describing the accident said: "I saw the other car with which our car collided, it just slid around in front of us and we bumped into it, I saw it skid around in front of us about a minute before the accident. Our car was inside (meaning the right side) of the black line".

Mrs. Sparks, a sister of Mrs. Reuter, was another occupant of the car, and she testified that she saw the Ferguson car just before the accident and it was right in front of the Reuter car. "Immediately prior to the accident it seemed to be cross ways, skidding right in front of us. The front end of it was towards my left. Harold's car was on the right side of the black line". She also testified that after the accident she observed the cars and that the Reuter car was on the right side of the black line and the other car was right in the middle of their traffic lane.

Harold Reuter, the defendant below, testified that the traffic was moderate and the road was level and straight at the place of the collision and he could see two miles ahead, and there were no cars in front going in the same direction and only the Ferguson car coming toward him. That when the Ferguson car got about fifteen feet from him, the back right wheel slipped off the pavement, the car skidded cross ways and came across the road and struck the front end of his car, the collision taking place in his traffic lane. He further testified that he had driven automobiles every day for five years preceding this accident, and had driven this particular car for two years and in his opinion he was going



forty-five miles per hour and the Ferguson car was going at the same rate of speed just before the collision; that he applied his brakes and his car did not skid.

The pertinent part of Sec. 43-b, Chap. 95a, Cahill Illinois Revised Statutes, 1933, provides that no person riding in a motor vehicle as a guest, without payment for such ride, shall have a cause of action for damages against the driver of such motor vehicle for injury in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver and unless such wilful and wanton misconduct contributed to the injury for which the action is brought.

As defendant in error was a guest at the time of the injury, plaintiff in error cannot be held liable in this action unless the collision was caused by his wilful and wanton conduct and unless such conduct contributed to her injury. The weight of the evidence inclines us to the opinion that the Reuter car at the time of the collision was in its proper, north bound, traffic lane and the Ferguson car, south bound, skidded over the center line of the pavement into the north bound traffic lane into the path of the Reuter car. The undisputed evidence is that Harold is an experienced and competent driver. The collision occurred in the early evening of a summer day, while it was light. The pavement was level and straight. The driver could see ahead for a distance of more than a mile, there were no other cars, according to the weight of the evidence, in view, except the Ferguson car. While the pavement was damp, we are unable to say that, considering the use of the highway and surroundings just before and at the time of the collision, that the Reuter car was traveling at an improper and unreasonable rate of speed, but even if it were, it would not necessarily follow that plaintiff in error was guilty of such wilful and wanton misconduct as would authorize a recovery in this proceeding.





It is true that the driver of the Ferguson car testified on direct examination that her car was on the right hand or west side of the black line when the collision occurred. She is the only one who did so testify, and her testimony was weakened by her statements made on cross examination, and she was flatly contradicted by Mrs. Reutter, Etheline Sparks, Mrs. Sparks and Harold Reuter, not only upon this question but in other particulars, notably her statement that the Reuter car was traveling just behind another car. Furthermore, it also appears from the evidence that the car driven by Laura Ferguson belonged to Dewey Wright and was destroyed by fire following the collision. She, therefore, cannot be said to be an entirely disinterested witness.

In Walldren Express Co. v. Krug, 291 Ill. 472, the court said: "A charge of wantonness implies an act intentionally done in disregard of another's rights, designed and intentional mischief, and not a mere negligent omission of duty".

In Brown v. Illinois Terminal Co. 319 Ill. 326, the court said: "It has been frequently said by this and other courts that whether an injury is the result of wilful and wanton conduct is a question of fact, to be determined by the jury from all the evidence, Where there is no evidence tending to support the charge of wilful and wanton conduct, there is no question of fact to submit to a jury, and the motion to direct a verdict on those counts would present a question of law for the court to decide. Courts have recognized the difficulty of accurately stating under what circumstances a defendant may be held guilty of wilful and wanton misconduct in causing an injury. Such conduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill-will is not a necessary element to establish the charge. \* \* \* A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of



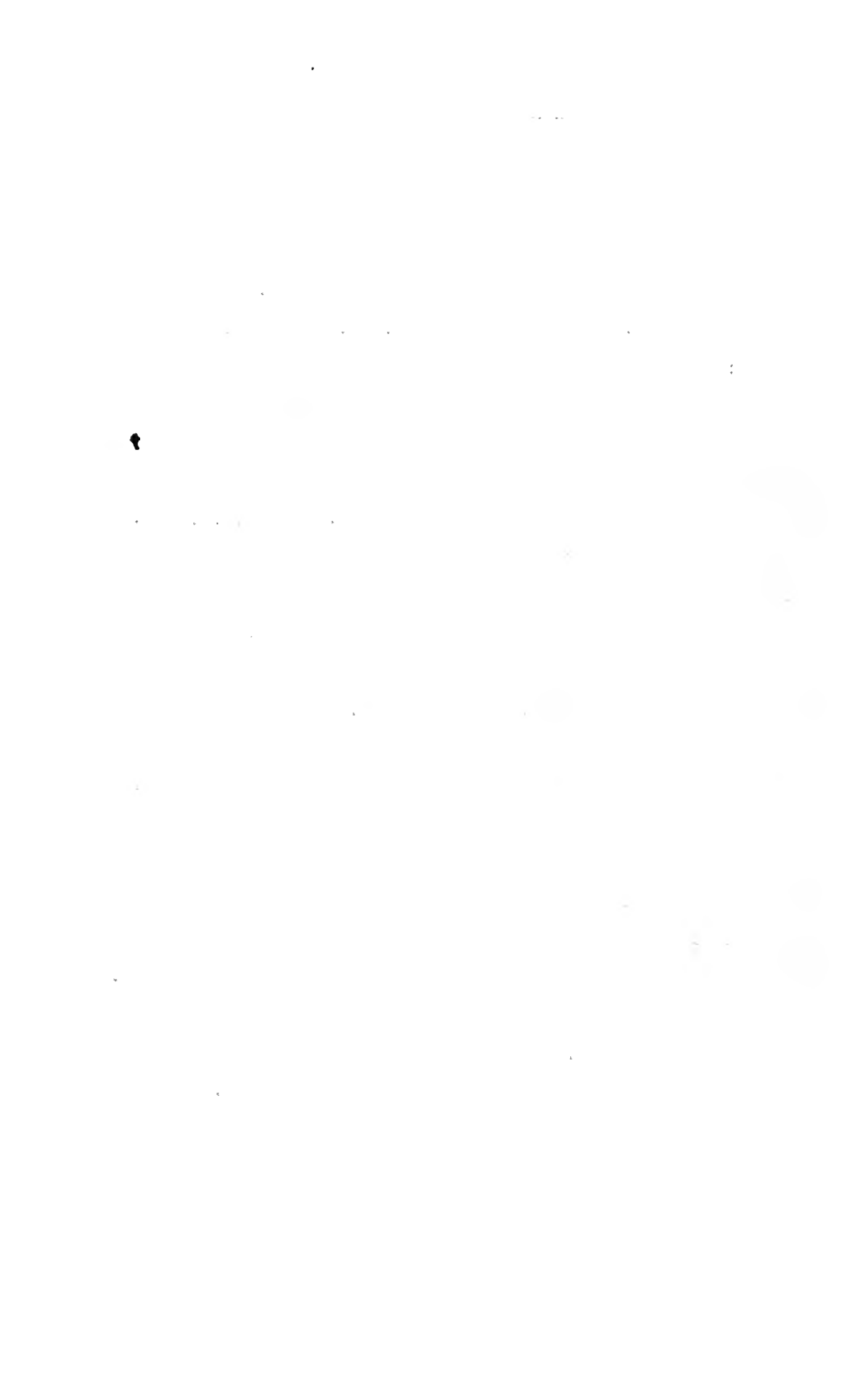
others, such as failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care".

In *Bernier v. Illinois Central Ry. Co.*, 296 Ill. 464, it was said: "To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. (20 R.C.L. 21). It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a wilful or wanton act. Whether an act is wilful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others, it will justify the presumption of wilfulness or wantonness".

According to the weight of the evidence in this record, the proximate cause of this accident was not the wilful and wanton misconduct of plaintiff in error, as defined by the foregoing authorities. It will therefore not be necessary for us to comment upon the other errors to which our attention has been directed.

The judgment of the Circuit Court of Peoria County is reversed and the cause remanded.

Reversed and Remanded.



STATE OF ILLINOIS,        }  
SECOND DISTRICT        }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this\_\_\_\_\_day of \_\_\_\_\_in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



27-1

57

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:  
Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 607<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
AUG 3 - 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In the Appellate Court of Illinois

Second District

May Term, A. D. 1934

Herman Lichthardt,

appellant,

vs.

Louis A. Backhaus,

appellee,

Appeal from the Circuit Court

of Du Page County

Dove - J.

Appellant, Herman Lichthardt, instituted this suit before a Justice of the Peace on January 27, 1932, resulting in a judgment from which he appealed. On March 13, 1932, his appeal bond was filed and approved by the Justice and a transcript of the proceedings duly filed in the office of the Clerk of the Circuit Court, who entered the cause on the docket of that court.

On April 20, 1933, the appearance of appellee was entered in the Circuit Court and that of his attorneys. Subsequently and during the June Term 1933 of the Circuit Court, the Clerk prepared a trial calendar of eighty-seven cases, the instant case being the thirty-second case, and sent a copy thereof to all the parties or their attorneys, whose names appear upon the calendar. At the top of the first page of said trial calendar appears the following:

CIRCUIT COURT - DuPAGE COUNTY.

"APPEAL CASES.

SUBJECT TO TRIAL SEPTEMBER 18, 1933.

ALL CASES MUST BE READY FOR TRIAL.

OR THEY WILL BE DISMISSED.

The first twenty cases are first day cases."

On September 18, 1933, the court called this case for trial and no one appearing, dismissed the appeal and awarded a writ of procedendo.

On September 29, 1932, appellant having served notice on counsel for appellee, filed his petition to vacate and set aside



the order entered on September 18, 1933 and moved that the case be set down for hearing. Thereafter an amended petition was filed, supported by affidavit, and from an order denying appellant's petition to set aside the order dismissing the appeal entered on September 18, 1933, an appeal has been perfected to this court.

In the affidavit in support of appellant's motion, it appears that this suit was instituted to recover rent upon certain premises owned by appellant. That in July 1933 counsel for appellant wrote the Clerk of the Circuit Court with reference to this case and on July 26, 1933 received a reply from the Clerk stating that "notice would be sent to him before trial of any of the appeal cases". That on September 23, 1933 counsel did receive a trial list of the cases and wrote the Clerk and was then informed of the proceedings had on September 18, 1933. It also appears from the affidavit of appellant that the Clerk had sent him a list of appeal cases, but it was received by another person of the same name as appellant and that it never reached appellant until "around the 22nd of September, 1933."

The pertinent part of rule four of the Circuit Court in effect at the time the order dismissing the appeal was entered provided that in all cases of appeal from Justices of the Peace, the appellant shall file a written appearance in that court before the third day of the term commencing not less than ten days next after the transcript is filed in that court. If such appearance is not filed the cause may be placed on the trial calendar in its numerical order without notice. When the case is reached for trial, if the plaintiff is appellant and fails to appear, the suit may be dismissed for want of prosecution on motion of defendant, or by the court of its own motion. All appeal cases shall be placed on a separate trial calendar at each term.



Section 21 of the Practice Act provides that all causes shall be tried, or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct, and no suit, action or proceeding at law shall be dismissed for want of prosecution at any time except when such cause shall be actually reached for trial in its order as set for trial, or upon the short cause or delay trial calendar of the court.

The order from which this appeal is prosecuted found that this case appeared on the trial calendar subject to trial on September 18, 1933, that it was called for trial and no one appeared for appellant, and thereupon the appeal was dismissed.

The trial calendar lists eighty-seven appeal cases and states they are subject to trial September 18, 1933 and that all cases must be ready for trial or they will be dismissed. This case was called for trial and no one appeared for appellant. The rules made it appellant's duty to file a written appearance on or before June 15, 1932. This was not done, so the court had a perfect right to place the cause on the trial calendar in its numerical order without notice, and when it was reached for trial, the court was justified under its rules in dismissing the appeal for want of prosecution.

Appellant insists, however, that the words "The first twenty cases are first day cases", appearing upon the trial calendar limited the call by the court on September 18th, to the first twenty cases and as the instant case was the thirty-second case, the court was without jurisdiction to dismiss this appeal until the following day. Counsel for appellee say that these quoted words mean that counsel in cases following the first twenty might urge this notation as a reason for having their cases reset for some day other than September 18, 1933.

We do not believe that the court was without jurisdiction



to dismiss this appeal because of the appearance of these words upon the calendar, because the calendar does say in unambiguous language that these eighty-seven appeal cases are subject to trial September 18, 1933 and the record discloses that the instant case was reached and called for trial on that day, and no provision of the Practice Act nor any rule of court was violated by the entry of the order dismissing the appeal. The Clerk owed appellant or his counsel no duty which he omitted, although as a matter of courtesy he had sent a trial list to both appellant and his counsel, but this trial list was never received by either until almost a week after the entry of the order dismissing the appeal. The appeal had been pending in the Circuit Court for sixteen months and no orders had been entered therein, and counsel for appellant had not entered an appearance in that court.

While courts should always hesitate to deny to a litigant the right to have his case tried, still it is necessary for the orderly dispatch of business for courts to make reasonable rules, and when made to adhere to them. If appellant is placed at a disadvantage by the entry of the order appealed from, the court is not chargeable therewith.

We are unable to say upon this record that the trial court abused his discretion in entering the order appealed from, and it is therefore affirmed.

Order affirmed.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On Aug. 23, 1934,  
on a petition for re-hearing  
an additional ~~the~~ opinion of the Court/ was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

May Term, 1934.

Herman Lichthardt,

Appellant

v.

Appeal from the Circuit

Louis A. Backhaus,

Court of DuPage County.

Appellee.

OPINION UPON PETITION FOR RE-HEARING

PERCURIAM:

Counsel, in their petition for re-hearing, insist that the record discloses that the lower court entered the order dismissing this cause before it was actually reached for trial and that therefore the court lacked jurisdiction to enter the order of dismissal.

Rule four referred to in the opinion provides that when a case is reached for trial and if the plaintiff is appellant and he fails to appear that then the suit may be dismissed by the court either on motion of the defendant or upon its own motion. The record in the instant case recites that this case appeared on the trial calendar subject to trial on September 18, 1933, that it was called for trial and no one appearing for appellant, the appeal was dismissed.

Counsel for appellant also insist in their petition for re-hearing that the order of September 18, 1933 is silent as to any reason for the dismissal of the case. This is a misapprehension, inasmuch as the order of September 18, 1933 recites as the reason for the dismissal of the appeal the fact that when the case was called for trial, no one appeared for appellant.

The trial court, in our opinion, was not without jurisdiction to enter the order of dismissal on September 18, 1933.

REHEARING DENIED.



STATE OF ILLINOIS,      }

SECOND DISTRICT      }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 6073

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BE IT REMEMBERED, that afterwards, to-wit: On

AUG 3- 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



In the Appellate Court of Illinois

Second District

February Term, A. D. 1933

The First Trust Company of  
Ottawa, Illinois, Trustee,  
appellee,

Appeal from the Circuit Court of

vs,

La Salle County

Laura M. Kiner, et al,  
(Laura M. Kiner  
appellant),

HUFFMAN - J/

This is an appeal from an interlocutory order appointing a receiver in a foreclosure proceeding pending in the circuit court of La Salle County. Appellant urges two reasons for reversal. First, that proper notice of the application for a receiver was not given appellant; and second, that there was no showing why appellee should not have been required to give bond as provided by statute and no finding by the court that for good cause shown, it was of the opinion that a receiver ought to be appointed without such bond.

The power to appoint a receiver is controlled by Sec. 1 of the act pertinent thereto, Ch. 22, Par. 55, Cahill's St. 1931. This section provides as follows: "Before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the court or Judge may order, and with security to be approved by the court or Judge, conditioned to pay \* \* \* provided that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond." The order appointing the receiver in this case does not disclose that upon a full hearing, the court was of opinion a receiver



ought to be appointed without bond, as required by statute. The power to appoint a receiver in the case at bar, is controlled by the above statutory provision, the requirements of which, it is needless to discuss in this opinion. It has consistently been held that a receiver should not be appointed under such circumstances unless and until the statutory requirements have been strictly complied with. One of the conditions precedent to such appointment is, that "good cause be shown and upon notice and a full hearing, " and further that the court shall be, "of opinion that a receiver ought to be appointed without such bond." The order as it appears in this case, is silent upon these two things.

It is also insisted that due notice was not given as contemplated by the statute. The record recites that a notice of the application for receiver was sent by ordinary mail to appellant at a given street address in Miami, Florida. No appearance was entered for the appellant and it does not appear whether she ever received the notice. It has been held that notice of motions on a person who has been sued but who has not entered his appearance, shall be served personally upon him, or if not found, by leaving a copy at his residence or place of business. Service of notice of any proceeding in court is supposed to be personal service unless otherwise designated by law. *Chicago Title and Trust Co. v. Lauletta*, 265 Ill. App. 564; *Grabowski v. MacLaskey*, 257 Ill. App. 484; *Haj v. American Bottle Co.* 261 Ill. 362.

The order of the court appointing the receiver in this case failed to disclose that it was entered after a full hearing, nor does it appear in the order that the court was of the opinion the receiver should be appointed without bond for good cause shown. As disclosed by the record, the appointment of the receiver was not in compliance with the statutory requirements, which cannot be dispensed with. We adhere to the doctrine as announced in prior cases, among which are, *Chicago Title and Trust Co. v. Bickley*,



255 Ill. App. 45; Goodman v. Heinen, 255 Ill. App. 395; and cases therein cited.

The order of the circuit court of La Salle county appointing a receiver herein, is reversed.

Order reversed.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



8627  
41  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 6074

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BE IT REMEMBERED, that afterwards, to-wit: On

AUG 3 - 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

100

100

In the Appellate Court of Illinois

Second District

February Term, A.D. 1933

The First Trust & Savings Bank

of De Kalb, Illinois, Conservator,

etc.,

appellee,

vs.

Appeal from the Circuit Court

of De Kalb County

Leone Langford, et al,

appellants,

Huffman - J.

Appellee filed its bill on June 18, 1932, in the Circuit Court of De Kalb County, against appellants, praying that certain certificates of deposit issued by the Farmers and Traders State Bank of Shabbona, Illinois, at the instance of one Rilla Middleton, be declared null and void and set aside; that they be surrendered to appellee as conservator for the said Rilla Middleton; and that the said bank be enjoined and restrained from the payment thereof; and that the other appellants be enjoined and restrained from the collection thereof and from instituting any suit or proceeding at law or equity for such purpose; and for general relief.

Rilla Middleton was a widow 67 years of age. She had been judicially declared mentally incompetent of managing and caring for her estate. Appellee under order of the county court of DeKalb County, was the duly appointed, qualified, and acting conservator for said incompetent. Rilla Middleton was in possession of a large number of notes and securities as well as a certificate of deposit for \$24,000, and real estate located in said county and elsewhere. The purpose of the bill was to prevent alleged waste of the estate of the distracted person, by the cashing of the certificates of deposit which she had caused to issue prior to qualification of appellee as conservator, but which she had not delivered until after



such time.

The bill of complaint was sworn to and supported by affidavits. A temporary restraining order was issued as prayed. Motion was made to dissolve the temporary injunction, on the face of the bill, answers and affidavits thereto. This motion was denied by the trial court, and appellants bring this appeal under Sec. 123 of the Practice Act, Cahill's St. 1931, Ch. 110, par. 122.

The affidavit in support of the answers is made by Rilla Middleton and is extensive in its nature, covering forty-seven pages of the abstract. In such cases as this, where a temporary injunction has issued and the court has subsequently denied a motion to dissolve same, we are inclined to give due consideration to the action of the trial court. In all probabilities this cause has already proceeded to a final hearing, but irrespective of that fact, after a careful review of the case, we are of the opinion that the exercise of the sound discretion of the Chancellor in this instance should not be interfered with. The order of the trial court denying the motion of appellants to dissolve the temporary injunction is affirmed.

Order affirmed.





STATE OF ILLINOIS,        }  
SECOND DISTRICT        } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



8813  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 608'

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BE IT REMEMBERED, that afterwards, to-wit: On

AUG 3 - 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



## Second District

May Term, A. D. 1934.

vs.

Appeal from the Circuit  
Court of Bureau  
County

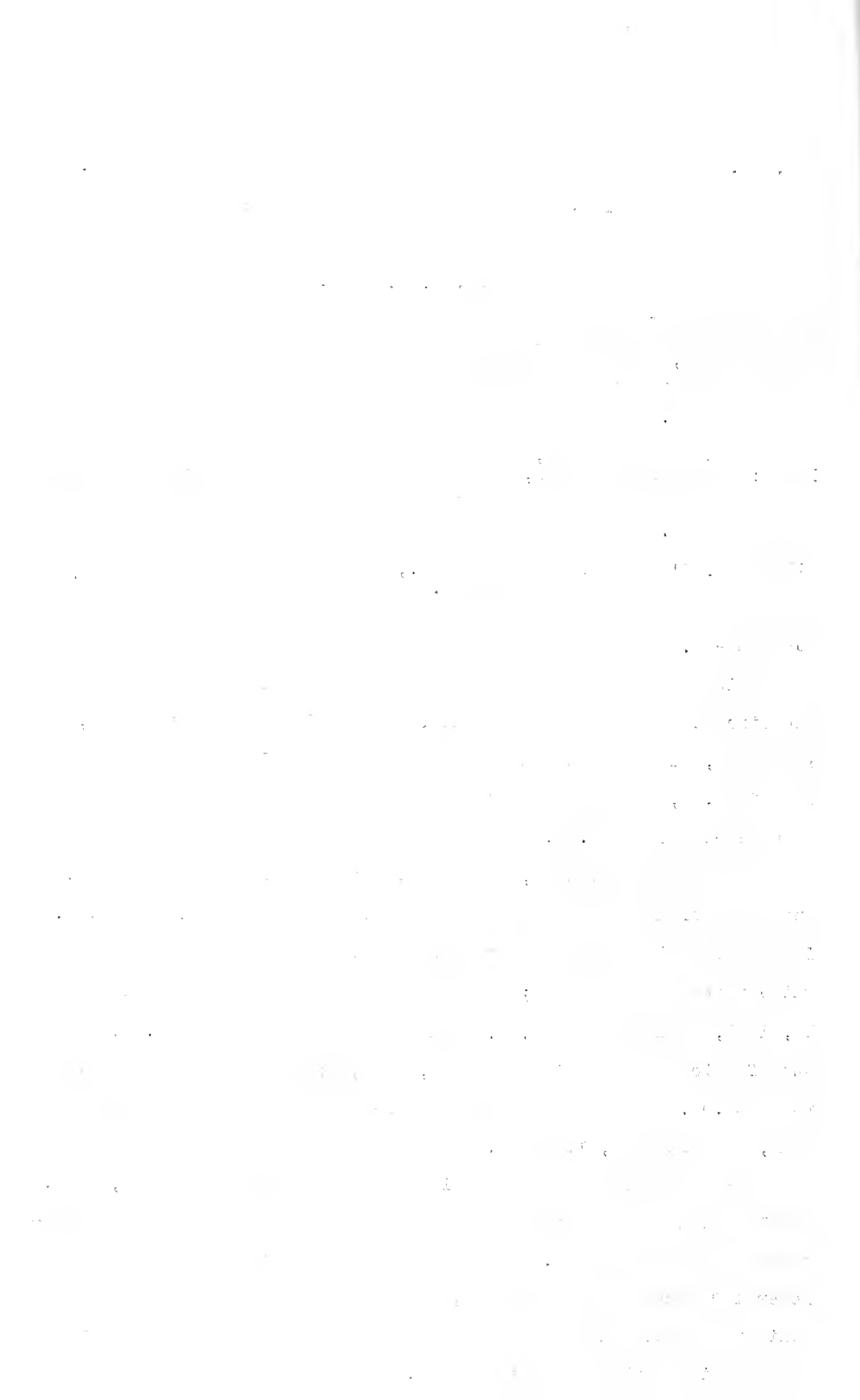
vs.

William L. O'Connell, Receiver, etc.,  
appellant.

This appeal is prosecuted by the appellant from a decree of the circuit court of Bureau County, entered in favor of appellee, Edd Bower, allowing his claim against the La Moille State Bank for \$2041.82, and denying the claim of the receiver of the bank to a set-off of \$606.06.

On February 28, 1927, Edd Bower, hereinafter called appellee, purchased from the La Moille State Bank, a bank draft for \$3150.00. In settling with the bank for this draft, appellee used two checks which were payable to him; one of which checks was dated February 17, 1927, issued by one C. W. Schindle, in the sum of \$700.00, and one of which was dated February 28, 1927, issued by one Joe Sadnick for \$354.00. Both of these checks were drawn on the Arlington State Bank, of Arlington, Illinois.

The draft was issued and paid in due course, on March 12, 1927. The La Moille State Bank sent the two foregoing checks to its correspondent bank in Chicago. These checks were cleared through the Federal Reserve Bank of Chicago, and by that bank sent to the Arlington State Bank for payment, upon which bank they were drawn and at which bank they were payable. When these checks were received



by the Arlington State Bank, the makers thereof each had more than sufficient funds on deposit to pay same. The Arlington State Bank upon receipt of the checks, accepted same, charged them to the accounts of the respective makers, upon the books of the bank, marked them paid, and they were thereafter returned to said makers.

The Arlington State Bank forwarded its draft to its correspondent bank in Chicago, for payment of the two above checks. Before this draft cleared, the Arlington State Bank closed, and the draft was not paid. Subsequently the amount of these checks was charged back to the account of the La Moille State Bank, by its correspondent bank, in Chicago.

A receiver was appointed for the ~~Arlington~~<sup>Arlington</sup> State Bank. On August 23, 1927, the La Moille State Bank filed its claim as a general creditor with the receiver of the Arlington State Bank for \$1054.00, being the total amount of these two checks. The claim was allowed and the La Moille State Bank received thereon from the receiver of the Arlington State Bank dividends amounting to the total sum of \$447.04, leaving an unpaid balance of \$606.06, upon such claim.

Nothing more occurred after the La Moille State Bank filed its claim as aforesaid under date of August 23, 1927, until November 27, 1931, when the said La Moille State Bank suspended business. Following this, a receiver was duly appointed for the La Moille State Bank, and on February 6, 1932, the appellee herein filed his claim as a general creditor with the receiver of the La Moille State Bank for the sum of \$2041.82, which sum of money he had on deposit with said bank at the time it closed. The receiver contested the allowance of the claim as filed by appellee and insisted that he was entitled to a set-off of \$606.06, because of the balance due that bank from the Arlington State Bank upon its claim theretofore filed in August, 1927, as aforesaid. The matter was referred to the Master, who





reported his findings in favor of the appellee. Appellant's objections to the Master's report were overruled, and were permitted to stand as exceptions in the trial court. On February 26, 1934, the trial court entered its decree in accordance with the Master's report, and decreed that the exceptions thereto should be disallowed and overruled, and ordered that the claim of appellee be allowed as a general claim, in the sum of \$2041.82, as filed, to be paid by said receiver in due course of administration for the liquidation of the bank. From this decree of the court, appellant has prosecuted this appeal.

The checks in question herein that were issued by Schindle and Sadnick upon the Arlington State Bank, were presented to that bank for payment in due course and were accepted by said bank and were paid in so far as the makers of said checks are concerned. This terminated appellee's liability as an indorser thereon. "When the bank on which a check is drawn performs the dual function of collecting and crediting, the transaction is closed and in the absence of fraud or mutual mistake, is equivalent to the payment in usual course". Ill. Sav. Bank v. Northern Bank, 292 Ill. 11, 14.

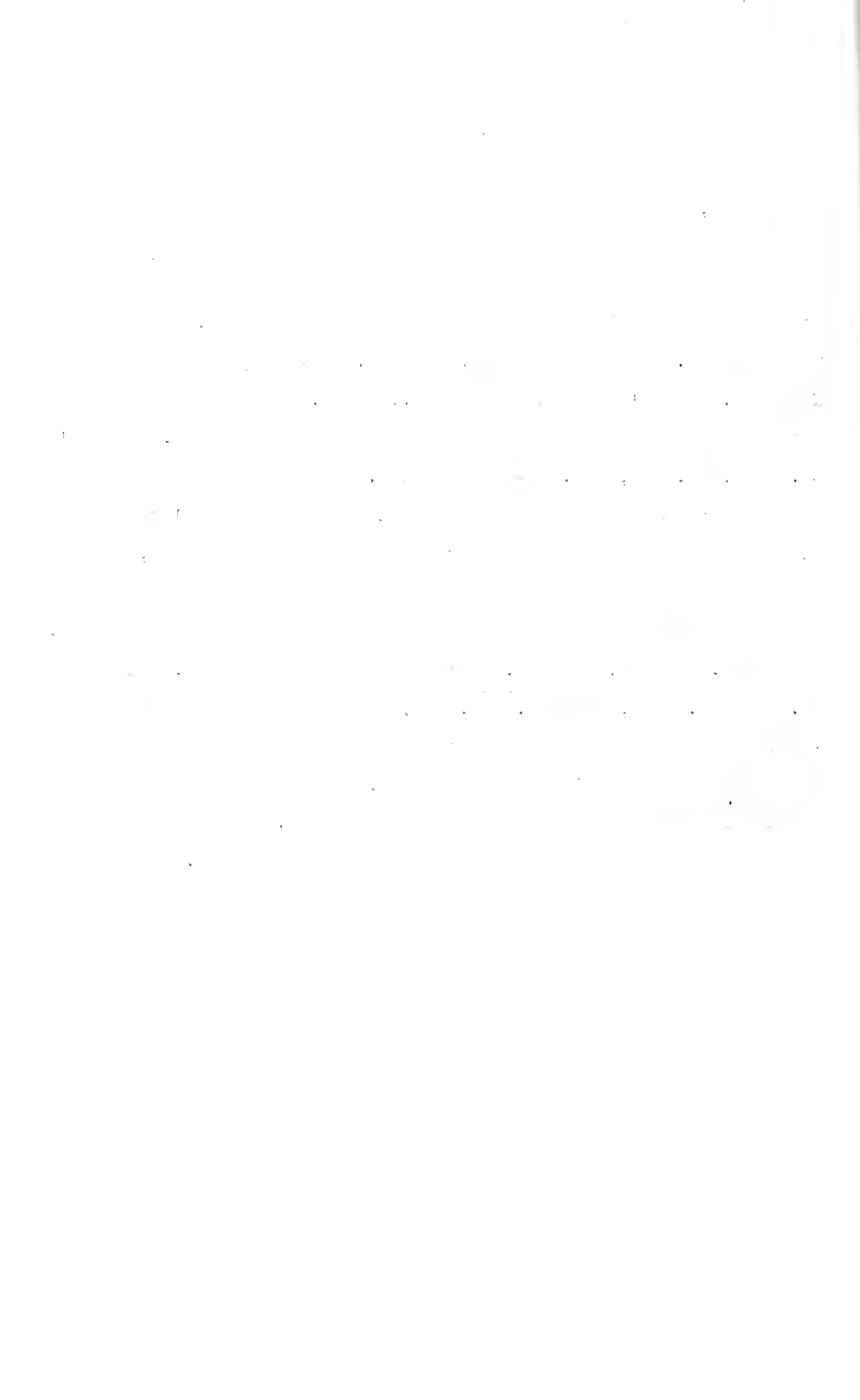
The checks in question were sent to the Arlington State Bank for payment and remittance. The acceptance of the checks and the charging of them to the makers' accounts, created a duty upon the Arlington State Bank to remit, which duty was not discharged until such remittance was made, and the failure of such bank to perform this duty, does not have the effect of altering or changing the relationship created to that of debtor and creditor. People, ex rel Nelson, v. People's Bank and Trust Co. 268 Ill. App. 39, 43, 44; 353 Ill. 479. It was held in the foregoing case that the proceeds from such checks constituted a trust fund for the payment thereof. Where a drawee bank receives a check of a depositor for collection and remittance, and marks it paid, and debits the account of the maker, returns the check to him and draws a draft upon another bank



in payment, which is dishonored because of the intervening insolvency of the drawee bank, the money represented by the check is considered held in trust by such bank for the payee, who is consequently entitled to a preferred claim in the assets of the drawee bank. People ex rel Nelson v. Bank of Rushville, 270 Ill. App. 416; People ex rel Nelson v. People's Bank and Trust Co., supra. These rights as announced in the two above cases are now fixed by statute. Cahill's St. 1931, Ch. 16a, Sec. 25-39 inclusive.

The Arlington State Bank in charging its depositors' accounts with the amounts of the two checks, this sum, was in effect, taken from their accounts and held by such bank for the legal holders of those checks, and they were entitled to full payment of the same. McQueen v. Randall, 353 Ill. 231; People ex rel Nelson v. Joliet Tr. and Sav. Bank, 273 Ill. App. 138. We do not consider that the appellant established indebtedness on the part of appellee to the La Moille State Bank in the sum of \$606.06 as claimed, and the decree of the trial court is therefore affirmed.

Decree affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



8791  
AT A TERM OF THE APPELLATE COURT, H

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 608<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

AUG 24 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In the Appellate Court of Illinois  
Second District  
May Term, A. D. 1934.

George W. Cummings,  
(Plaintiff) Appellee,

vs.

Appeal from the Circuit Court

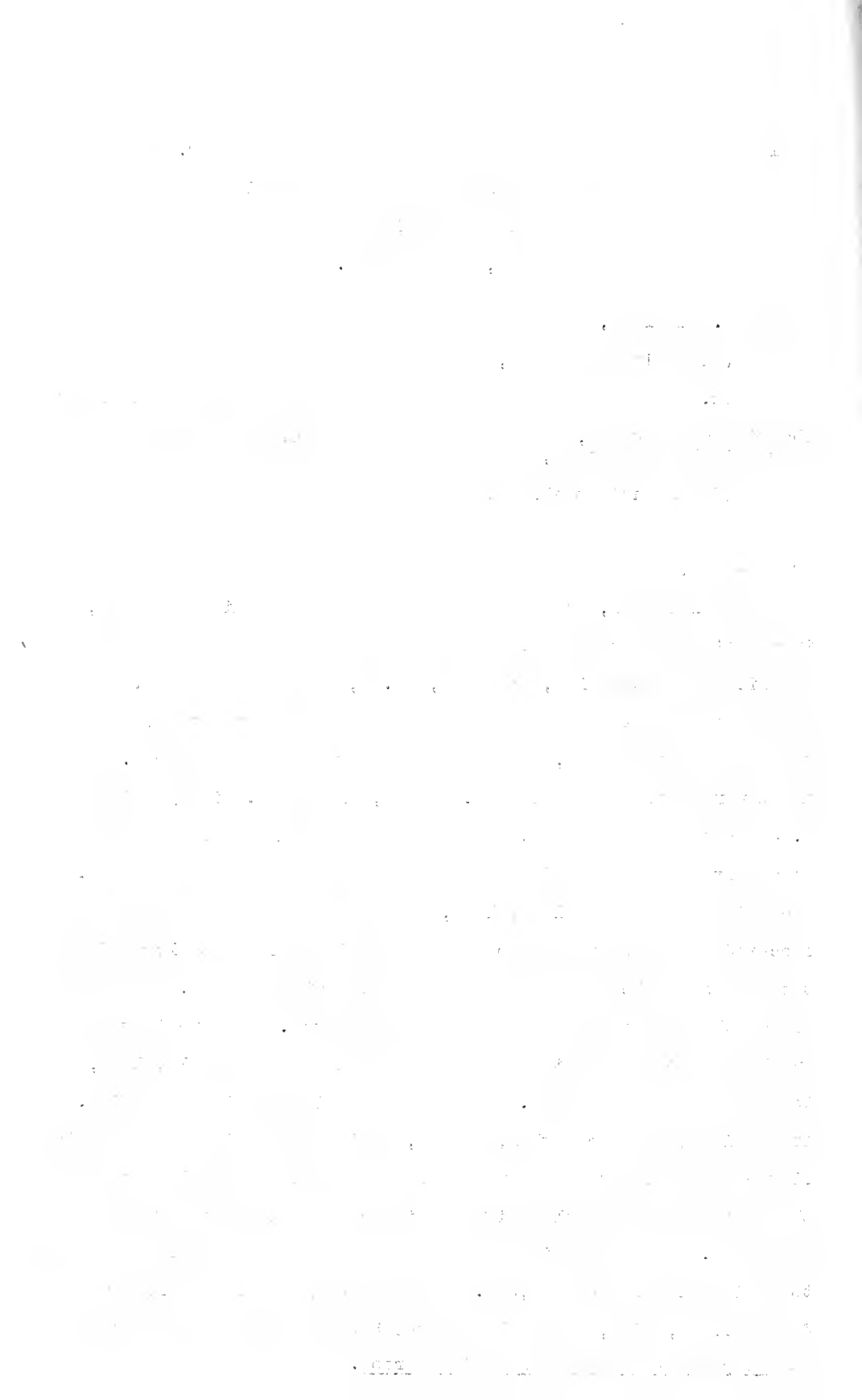
The City of Waukegan,  
a Municipal Corporation,

of Lake County

(Defendant) Appellant.

WOLFE - P.J.

This plaintiff, being the owner of fifteen promissory notes, in an action of assumpsit, secured a judgment against the defendant, a municipal corporation, for \$100,337.13, which was the aggregate amount of the principals of the notes with interest according to the terms of the notes, at the time the judgment was entered. The notes were executed by Edith T. Higley, Frances L. Higley, Violet E. Johnstone and Ernest M. Johnstone, her husband, who made the notes payable to themselves and they endorsed the notes in blank. The notes are dated July 9, 1928, and on that date the makers also executed their trust deed conveying certain real estate located in the City of Waukegan to secure the payment of the notes. A building was on the real estate when it was so conveyed. The premises were purchased from the mortgagors by the defendant on July 13, 1928, to be used as a city hall. The defendant did not sign the notes. Its obligation, to pay them, if any, must be found in the assumption clause contained in the warranty deed conveying the real estate to the defendant by the plaintiff. This deed was accepted by the defendant. The assumption clause of the deed is as follows: "Subject to an indebtedness of \$79,200.00 evidenced by notes and trust deed dated July 9, 1928, which the grantee herein assumes and agrees to pay as part of the purchase price hereof."



It is undisputed that the defendant took possession of the premises in question and remodeled the building thereon for use as a city hall. It would be impossible to restore the building to the status quo before possession was taken by the defendant.

The defendant urges eleven reasons, which it designates as propositions of law, for a reversal of the judgment. Ten of these propositions are based on the fact that the defendant is a municipal corporation and the defendant advances different reasons which it contends relieve the defendant from the obligation of the assumption clause of the deed because of that fact. The assumption clause would undoubtedly be binding on the defendant, and enforceable by the plaintiff as the owner of the notes, if the defendant was a natural and not a juristic person. (Scholten vs. Barber, 217 Ill. 148).

The deed, together with the notes and the trust deed, have been the subject matter of litigation in this court and in the Supreme Court. *Stripe v. City of Waukegan*, 254 Ill. App. 74; *Stripe v. Yager*, 348 Ill. 362; *Stripe v. City of Waukegan*, 262 Ill. App. (abstract opinion) 661; *The City of Waukegan v. Edith T. Higley, et al*, General Number 8698, of this court, opinion filed December 6, 1933. And it may be stated on the authority of the case of *Stripe v. Yager*, 348 Ill. 362 that the defendant on July 5, 1928 legally adopted a resolution to purchase the property in question for \$100,000.00. It agreed to pay \$20,800.00 in cash upon delivery of the warranty deed, and to assume and agreed to pay the trust deed indebtedness evidenced by the fifteen notes. The defendant on July 26, 1928, within the first quarter of its fiscal year, passed a general appropriation ordinance, in which there was appropriated, among other things, \$100,000.00 for new city hall property. This action and contract thus taken and entered into by the defendant were legal and also not ultra vires the



corporate powers of the city.

The notes are so drawn as to be payable on or before fifteen years from July 9, 1928. As pointed out in *Stripe v. Yager*, 225 Ill. 348, 362, the defendant had the right, if it so desired, to pay the notes within the current fiscal year. Regardless whether or not the assumption clause be legally enforceable against the defendant, its intention to pay the total purchase price of \$100,000.00 for the property appears from the resolution and the assumption clause and that amount constituted an indebtedness of the defendant. *Evans v. Holman*, 244 Ill. 596.

The resolution of the defendant to purchase the property from the mortgagors is in part as follows: "That the said city, shall purchase from Edith T. Higley, Frances L. Higley and Violet Johnstone, for the purpose of a city hall, the following described real estate \* \* \* \* for \$100,000.00". The sum of \$79,200.00, the aggregate amount of the principals of the notes secured by the trust deed, was retained by the defendant out of the agreed purchase price. It clearly appears from the resolution that the city was to pay the \$79,200.00 as part of the purchase price of \$100,000.00. "A party to a deed may produce parole evidence to show that the consideration was different from that expressed in the deed." - - *Harts v. Emery*, 184 Ill. 560. And evidence extrinsic of the deed is admissible to prove that a mortgage debt upon real estate was assumed by the purchaser as part of the consideration for the execution of the deed. *Brousseau v. Lowy*, 209 Ill. 405.

The contract on the part of the mortgagors has been fully performed and executed, by the delivery of the warranty deed. The defendant has taken possession of the property. As above pointed out, the purchase of the real estate for the purpose of a city hall for \$100,000.00 was not ultra vires. The defendant by its resolution agreed to pay the mortgagors \$100,000.00 for the real estate,



and by its general appropriation ordinance created its indebtedness for that purpose to the full amounts. The defendant has retained the amount of the debt of the trust deed out of the purchase price. The defendant is the owner and now in possession of the real estate. Under such circumstances, it becomes necessary to inquire if it is right and just for the defendant to repudiate its obligations thus voluntarily assumed even though there may be some question if a municipal corporation has power to assume mortgage indebtedness. *McGovern v. City of Chicago*, 281 Ill. 265. It should also be borne in mind that the defendant had the right to pay the notes during the fiscal year of 1928. *Stripe v. Yager*, 348 Ill. 362.

In the case of *Heid v. Vreeland*, 30 N.J. Eq. 591, where an agreement of assumption of the mortgage debt was implied on the part of the grantee of the deed, when he had agreed to pay a particular sum as purchase money and he had deducted the amount of the mortgage from the purchase price, it is said: "Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage, impose upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice, for it would seem to be almost intolerably unjust to permit him to keep back the vendor's money with the understanding that he would pay the vendor's debt, and still be free from all liability for a failure to apply the money according to his promise." *Ray v. Lobdell*, 213 Ill. 389; *Scholten v. Barber*, 217 Ill. 148, 41 C.J. page 741, Sec. 802. Under the terms of the notes the plaintiff has accelerated the time of the payment of the notes which had not reached maturity, because the defendant has not paid such notes that were due and payable when the action



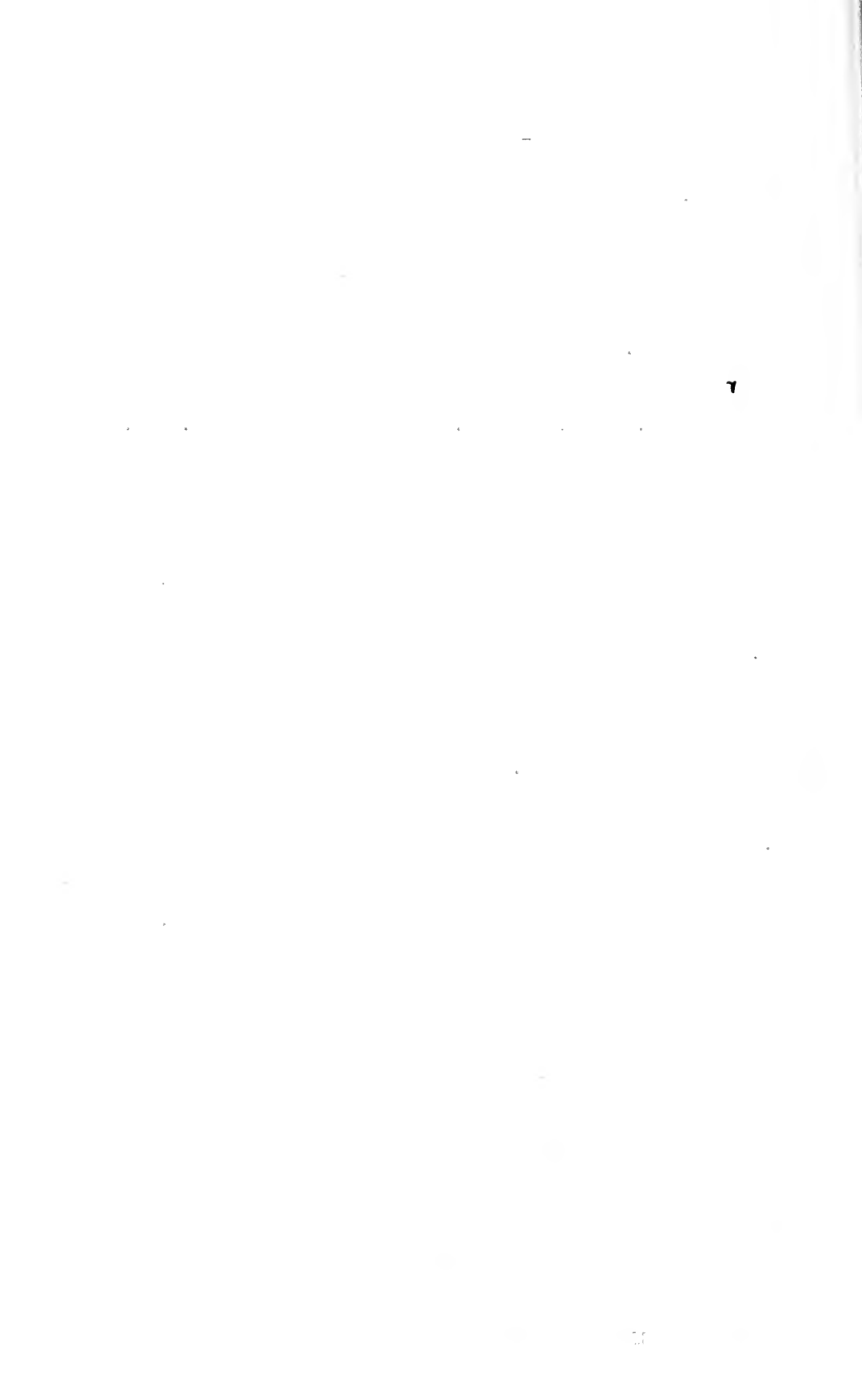


was brought. It is our opinion that the defendant is bound to pay the notes according to their terms with interest from the date of the delivery of the deed to the defendant. It is not contended that the interest on the notes was not correctly computed on the hearing before the court.

Our opinion as above expressed is strengthened by the case of Santa Cruz v. Wykes, 184 Fed. 752, affirmed, 202 Fed. 357. In that case the Circuit Court of Appeals held that the City of Santa Cruz with power, under an agreement of purchase, to incur the indebtedness attending the construction and requirements of a water works, also had power to assume obligations of the seller, as part of the price of the works, which were secured by a mortgage on the works. The decision in that case is also based on the principle, that a corporation will not be permitted to plead ultra vires as a defense to an executed transaction where the contract is completely performed on both sides. In such case the court will not interpose to restore either party to his former state or grant other relief. Relief will be granted if it can be done independently of the contract, or when a new, further, or independent consideration subsists in support of the transaction sought to be enforced.

The objections made by the defendant to the introduction of the notes in evidence, which are now urged as errors for reversal of the judgment, namely: that the defendant had no power to assume the payment of the notes, as such assumption amounts to an indirect issue of commercial paper by a municipal corporation and that the plaintiff is not the proper party to bring the suit and that the liability of the defendant is the reasonable value of the real estate are, in our opinion, all beside the point, that the trial court did not err in sustaining a demurrer to the pleas of the defendant setting up alleged defenses in substance similar to such objections.

It is finally contended by the defendant that where an issue



of fact is presented by pleadings and affidavit of merits, it is error to strike the same and enter judgment by default. Defendant states that its plea number seventeen denies "on information" that plaintiff is owner of the notes. No facts are alleged in the pleas to show which conditions specified in the Negotiable Instruments Law necessary to constitute ~~the~~ plaintiff a holder in due course has not been complied with. Plea number seven raised the question as to whether or not there was any appropriation for the fiscal year of 1928-1929, to pay the notes. As this question was determined in *Stripe v. Yager*, 348 Ill. 362, the plea was absolutely without merit. Plea number eight raises the question as to whether or not the defendant had any transaction with the plaintiff. This was an immaterial issue under the facts in the case.

The court did not err in entering judgment against the defendant. The judgment of the Circuit Court of Lake County should be, and is hereby affirmed.

Affirmed.



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STATE OF ILLINOIS,        }  
SECOND DISTRICT        } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this\_\_\_\_\_day of \_\_\_\_\_in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 608<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

AUG 24 1934

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:





In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

H. Stanley Antrim,

Appellee,

Appeal from the Circuit

vs.

Court of Ogle County

George Dick, A. M. Johnson,  
J. Fred Scholl, Henry Stahler,  
A. C. Coffman and C. D. Coffman,

Appellants.

DOVE - J.

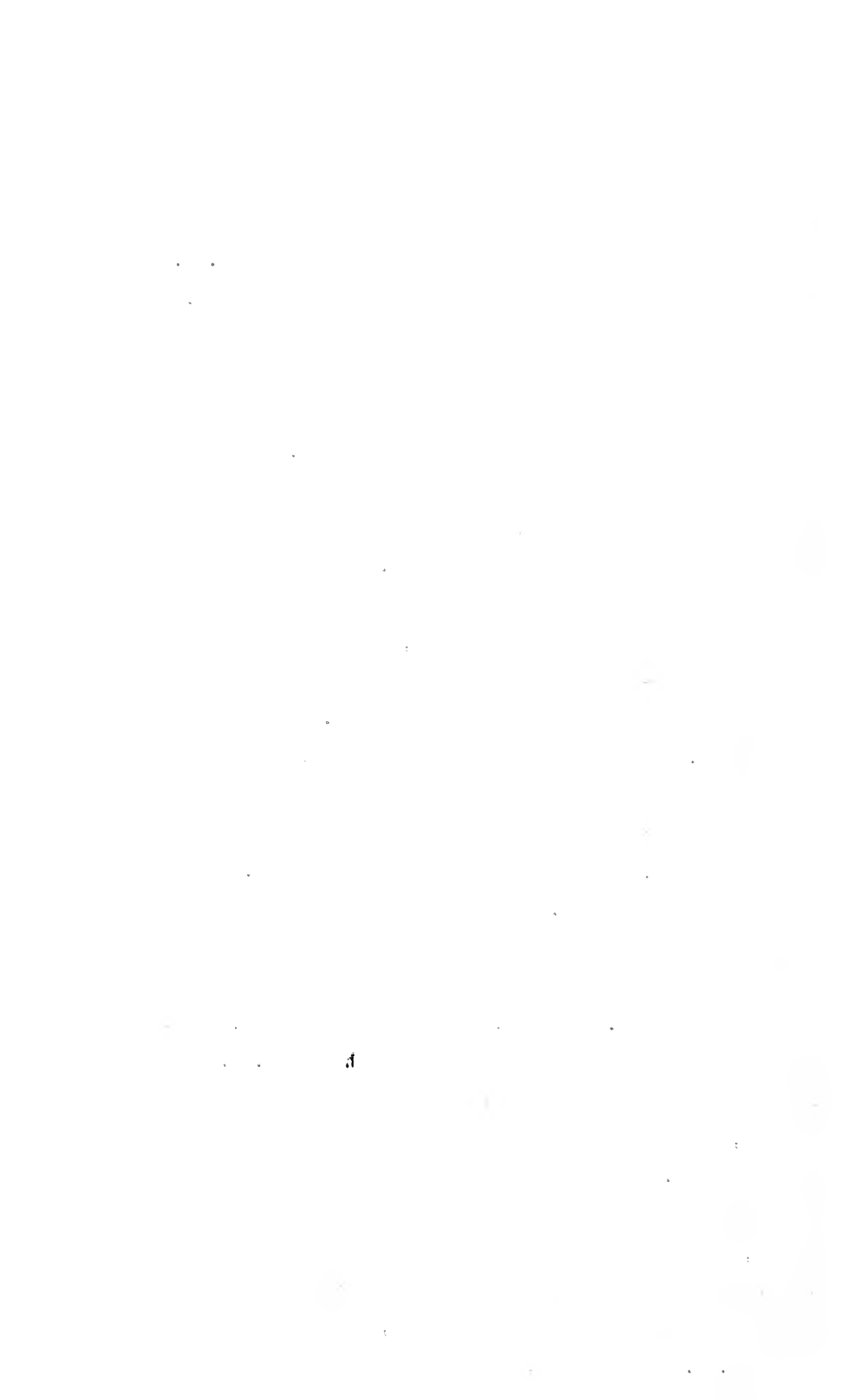
This is a suit brought by appellee to recover upon a written guaranty, alleged to have been executed by appellants. The special count of the declaration alleged that on March 1, 1927, Elizabeth A. Anderson made her promissory note for the sum of \$3,000.00 bearing 5% interest and payable to the order of herself five years after date, that in consideration that the plaintiff, at the request of the defendants, would accept and receive said note, the defendants, by their written endorsement thereon, guaranteed the payment of said sum of money and promised the plaintiff to pay the same according to the tenor and effect of said note, and that thereupon the plaintiff accepted and received from the said Elizabeth A. Anderson said note properly assigned and endorsed by her. Filed with this declaration was a copy of the note and guaranty. The guaranty on the back of the note being as follows: "For value received, we and each of the undersigned guarantee payment of the within note at maturity or any time thereafter", and under which appears the name of each appellant. Appropriate, verified, joint and several pleas, denying the execution and delivery of the supposed guaranty were filed, upon which issues were joined and, by agreement of the parties, a jury was



waived and the cause submitted to the trial court, resulting in a finding and judgment for appellee in the sum of \$3,458.25. From this judgment an appeal has been perfected to this court.

It is conceded by counsel for appellants that a guarantor of payment is an original promissor in accordance with the terms of the written contract of guaranty, and that the genuine signatures of appellants appear under the written guaranty. Appellants insist, however, that this guaranty was written above their names after the instrument left their hands, and that being true, there is no liability on their part in this proceeding. There is therefore no question of law involved in this appeal, but the question for determination is purely a question of fact, and that question is the existence or non-existence of this guaranty when appellants placed their names on the back of the Anderson note.

Henry H. Antrim is the father of appellee, and he testified that in 1927 he was chairman of the Board of Directors of the State Bank of Freeport; that when he first saw the note upon which the guaranty appears, it had been signed by Elizabeth A. Anderson and endorsed by her in blank. That he wrote thereon the guaranty immediately below her name, and that at the time he wrote the guaranty, no other names appeared on the back of the instrument except the name of Elizabeth A. Anderson. That on February 24, 1927, he enclosed that note in a letter written by him to E. J. Diehl, cashier of the Polo State Bank. That after mailing the letter to Diehl, in which he enclosed the note, he next saw it at the office of a Mr. Warner in Dixon, where it was delivered to him by appellant Scholl; that the note with the guaranty written thereon, under which were the names of appellants, was in the same condition then as it was when offered in evidence upon this trial, and that in return for said note, he gave Scholl his check for \$3000.00. This check, endorsed by Scholl and paid by the bank

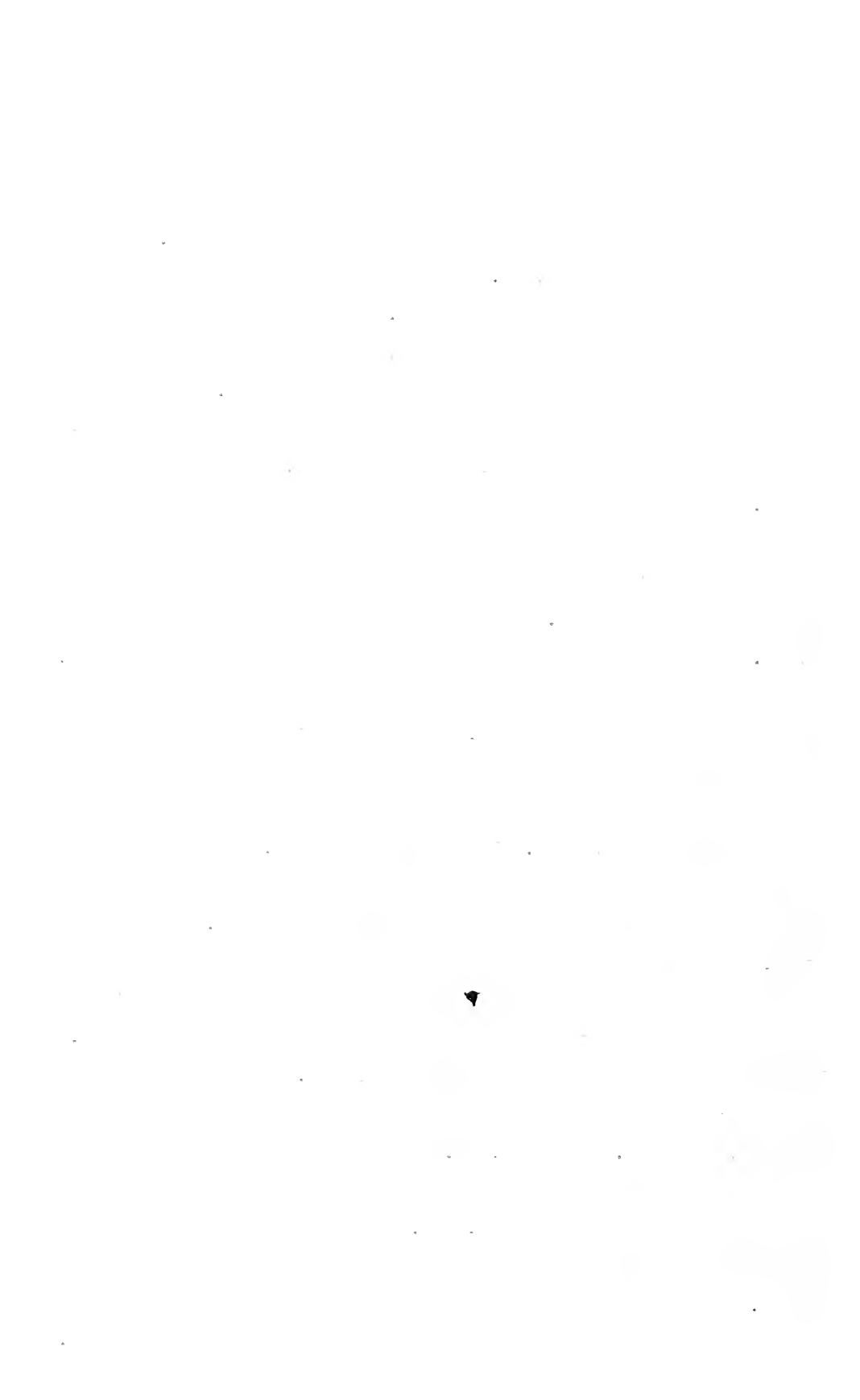


on which it was drawn in due course of business, was offered and admitted in evidence. Mr. Antrim further testified that in the fore part of February, 1927, he was in the Polo State Bank and Mr. Diehl, the cashier, inquired of him whether he wanted to make a nice real estate loan, that he told Mr. Diehl that he was one of the trustees of the D. E. Stover estate at Freeport and that he would confer with his other trustees and would come down and examine the farm offered as security, and suggested that appellant Scholl go with them; that subsequently W. A. Hann, co-trustee with ~~for~~ Mr. Antrim, in company with appellant Scholl, examined the farm offered as security and after consulting with the other trustee, J. Fred Smith, they advised Scholl that they would grant a loan for \$19,000.00. Subsequently Antrim advised Diehl by 'phone that the trustees of the Stover estate would not make the loan, but that he would try to make it himself, and later told him that he would take the loan personally and for Diehl to get the papers ready. That thereafter, but before the 24th of February, 1927, Antrim and appellants Johnson, Scholl and Dick had a conversation in the front room of the bank at Polo, in which it was stated by these appellants that Henry Hey owned the farm, the legal title to which was in the name of his sister-in-law, Elizabeth Anderson, and that he, Hey, was indebted to the Polo bank, and in order to get the loan under the legal limit which the bank could loan Hey, they had to have \$3,000.00 more, and requested of Antrim that he loan that additional sum. To this proposition Antrim replied that he felt the loan was heavy enough, but would let them know before he left town, and later he told them that if they would personally guarantee the \$3,000.00, that he would furnish the \$3,000.00 additional. At this time one of appellants said: "If any of us sign, all of the directors should sign it". And to this Antrim replied that if they thought that all of the directors should sign that would be acceptable, but that the three who were present were



satisfactory to him. Subsequently Scholl and Johnson notified Antrim that they would guarantee the payment of the \$5,000.00 and the notes aggregating \$22,000.00 were sent to Antrim, who retained them, with the exception of the \$3,000.00 one, which he returned to Diehl with his letter of February 24th. Antrim further testified that in the summer of 1931 he transferred this \$3,000.00 note to appellee, his son, along with some other personal property, in payment of an indebtedness due from him to his son.

E. J. Diehl testified that from January 1918 until January 1926, he was an employee of the Polo State Bank, and after that time he continued in its employ as cashier until it closed for liquidation in February of 1931. He further testified that the Anderson \$3,000.00 note came into his hands the latter part of February 1927, having been received by him through the mail from either the Freeport State Bank or Henry Antrim. This letter is the one referred to by Antrim in his testimony and was offered and admitted in evidence. It is on the letterhead of the State Bank of Freeport and is dated February 24, 1927. It is addressed to E. J. Diehl, and acknowledges the receipt from the bank, of which Mr. Diehl was cashier, of six trust deed notes, amounting to \$22,000.00, signed by Elizabeth A. Anderson and which, the writer of the letter states, he is holding in trust for the Polo bank, to be taken care of in Dixon on the first day of March, on which he is to provide \$22,000.00 in cash as represented by the trust deed notes. This letter then continues; "Of the above described trust notes, I am returning one herewith, being No. 4, for \$3,000.00, the payment of which is to be guaranteed by your Board of Directors, or such ones as we have agreed upon, just as you prefer. Mr. Scholl, Johnson and Dick are sufficient for me, but if you prefer to add the others, I will not object. I also return herewith for you to hold the trust deed securing the trust notes which has not been signed or acknowledged".





Mr. Diehl further testified that the note was not in his possession but a short time, but that it was signed by all the directors, and according to his recollection, the guaranty did not appear upon the note when appellants placed their names upon it in his presence.

Each appellant testified that the words of guaranty were not upon the note when each placed his name thereon, and according to the testimony of Dick and Scholl, Antrim agreed to make the additional \$3,000.00 loan if the bank directors would endorse it, at which time Dick inquired what their liability would be and when would it be determined, and that Antrim replied "Scholl has bought and sold land, he knows the value of land. When it comes to a time we have to sell it and get all of the money out of it that it will bring, we will sell it and if there is a shortage on this \$3,000.00 note, those endorsers will have to make it good".

There was also offered in evidence a letter written by appellants Johnson and Stahler, dated May 26, 1933, addressed to Henry Antrim, which is as follows: "Dear Friend Henry: The six guarantors met together last Saturday evening and after going carefully over the terms proposed in your letter of May 17th, were unanimous in this fact. They can not accept any such terms. It is only fair that the guarantors be given a chance to state a few reasons just why they can not accept such terms. First the loan was made to enable Henry Hey to carry on his business of farming and dairying. The obligations assumed by the guarantors only became a liability when Henry Hey made a failure of his business, and when all resources were exhausted, and there was a balance unpaid". As explaining why the words guarantors were used in this letter, Stahler testified that he did not understand the legal difference between the words guarantor and endorser, and Johnson testified that he did not believe that he knew just what the difference was.

The foregoing is substantially all the evidence that was



introduced upon the trial. The original Anderson note and the letters offered in evidence and herein referred to have been certified to this court and we have examined them in the light of the testimony of the several witnesses. There is nothing in the appearance of the Anderson note which indicates to our minds that the guaranty was not there at the time the appellants placed their signatures thereon. Deliberate perjury was committed by some of the witnesses who testified. The trial court had many superior advantages over us in determining where the truth lay, and taking into consideration all the competent evidence, documentary and oral, we cannot say that the conclusion arrived at by the trial court is unwarranted by the evidence. If Diehl and appellants are to be believed, Antrim must have placed this guaranty on the note after he accepted it from Scholl at Dixon on March 1, 1927, but previous to that time and on February 24, 1927, he returned it to Diehl for the express purpose of having its payment guaranteed by appellants and that appellants Johnson and Stahler considered they had so guaranteed it appears from the fact that they so designate themselves in their letter of May 26, 1933, not only once, but three times, and while these directors may not have known the technical, legal distinction between endorsers and guarantors, it is proper for the court to take into consideration the language which they employed. They were directors in a bank with resources at that time of approximately \$700,000.00 and presumably employed words to appropriately express the meaning they intended to convey. Furthermore, while appellants are all positive the guaranty was not on the note when they placed their names thereon, some of them also thought it was after March 1, 1927 when they did so, but in this they were mistaken, as the uncontradicted evidence is that the instrument was not there after that date. The trial was had more than six and a half years after the occurrence of which they testified took place. The original letter



of February 24, 1927, returning the note to be guaranteed by the directors of the Polo bank has been in the files of the Polo bank from the time it was received by its cashier until produced upon the trial of this case.

After carefully considering all the evidence in this record, we cannot say the findings and judgment of the trial court were clearly against the weight of the testimony, and therefore its judgment will be affirmed.

Judgment Affirmed.



STATE OF ILLINOIS,        }  
SECOND DISTRICT        }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this\_\_\_\_\_day of \_\_\_\_\_in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:  
Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On  
AUG 24 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

Estelle M. Milne,

appellant,

vs.

Appeal from the Circuit Court

of Winnebago County

Charles E. Whitmer, et al,

appellees.

HUFFMAN -J.

Ernest C. Stokburger, for a number of years conducted a real estate mortgage and loan business, in the City of Rockford, Illinois, known as "The E. C. Stokburger Agency." His business was to secure loans upon real estate located in the City of Rockford, for such persons as might apply for them. It was his habit and custom in the consummation of a loan, to take a trust deed of even date with the note or notes, for the premises involved, and to himself as "Ernest C. Stokburger, trustee." The note or notes thereby secured would be made payable to either bearer or to the makers thereof, and by such makers indorsed upon the back.

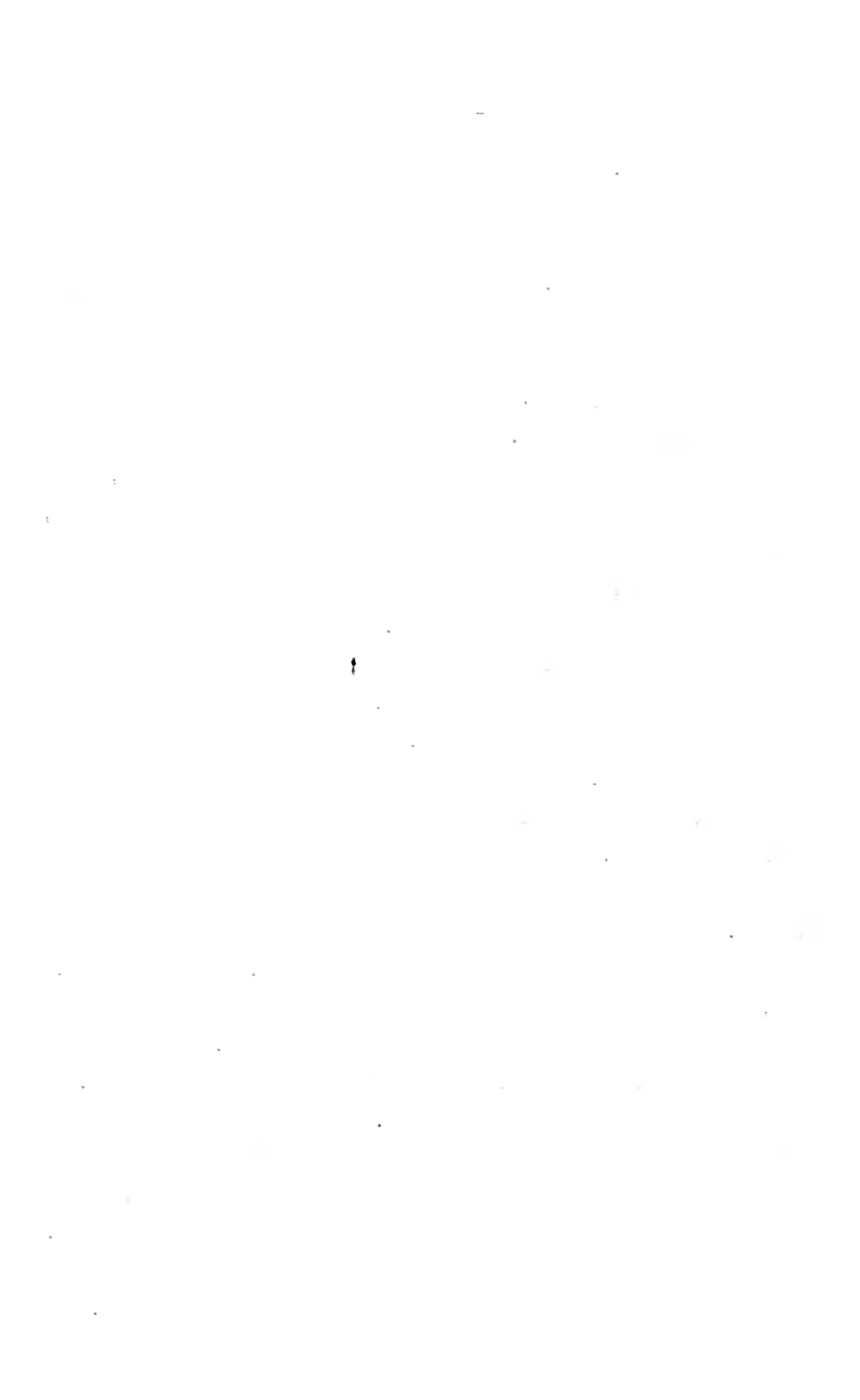
On December 1, 1924, Charles E. Whitmer and Maude V. Whitmer, his wife, upon making application to the said Stokburger, procured a loan of \$1500, executing a trust deed to the said Stokburger as trustee, upon three lots located in the City of Rockford. The note in that instance was made payable to the makers and by such makers duly indorsed. The note was of even date with the trust deed, provided for interest at  $6\frac{1}{2}$  per cent per annum, and was due in three years. In January, 1925, a salesman representing the said Stokburger, called upon Rose Clay, appellee herein, and represented to her that he had a good loan which he desired to sell. Appellee subsequently during said month of January, purchased the note from the said



Stokburger agency. The trust deed had been duly recorded by Stokburger. This loan became due December 1, 1927, whereupon Stokburger and the said Whitmers entered into an extension agreement for two years. The note next became due on December 1, 1929, whereupon Stokburger and the Whitmers entered into a second extension agreement for three years, thereby making the due date December 1, 1932. Stokburger did not record either of these extension agreements.

Following the above transactions, and about June 5, 1930, the Whitmers having paid \$500 upon the principal of the above loan, applied to the said Stokburger agency for a new loan of \$1900, upon the same premises. This loan was completed between the Whitmers and Stokburger for the amount desired. The note in this case was made payable to "Bearer." The interest fixed was 6% per annum; and the note was due five years after date. The note and trust deed were executed under date of June 5, 1930. This trust deed was given upon the same three lots. Prior to the execution of this new loan and trust deed, Stokburger released the first trust deed upon the records, as trustee therein. It will be borne in mind that the debt secured by this first trust deed, was by the records past due since December 1, 1927. Stokburger thereupon placed of record the second trust deed upon these premises, securing the \$1900 loan. On November 12, 1930, the note secured by the second trust deed was sold by the Stokburger agency to appellant herein, Estelle Milne.

Stokburger, thereafter, became badly involved and absconded. His loan agency passed into bankruptcy. It appears from the evidence in this case that the Whitmers defaulted upon some of the interest payments due upon the \$1900 loan, held by appellant, and that appellant brought her suit in foreclosure against the premises. It then developed that Rose Clay still held the note which was secured by the first trust deed and upon which \$1000 remained due.



It further appears that when the Whitmers secured the \$1900 loan on June 5, 1930, they left with Stokburger \$1000 to pay the balance due to the holder of the aforesaid \$1500 loan. This holder was Rose Clay. Stokburger converted the money to his own use. Thus we find Rose Clay urging in this case that since her mortgage was prior in point of time to that of appellant's, that her rights were paramount to those of appellant. Rose Clay had nothing of record to disclose that she was vested with any rights in the property secured by the first trust deed which Stokburger released. A similar situation involving the legal status of parties such as exist between appellee, Rose Clay, and the appellant, is to be found in *Mann v. Jummel*, 183 Ill. 523; *Connor v. Vahl*, 330 Ill. 136; *Doyle v. Barnard*, 271 Ill. App. 579, 590.

The Whitmers urge that the \$1000 left by them with Stokburger at the time of procuring the second loan of \$1900, constituted payment to appellee, Rose Clay. A situation similar to this existed in a former suit before this court growing out of dealings of the said Stokburger. *Culhane v. Layman*, 273 Ill. App. 557.

For reasons hereinafter appearing, a disposition of the above questions between Rose Clay and Estelle Milne as to rights of priority between them, and whether the \$1000 left by the Whitmers with Stokburger constituted a payment of the balance due Rose Clay, is not deemed necessary.

The Whitmers claim that at the time of securing the first loan from Stokburger, they paid certain sums of money for attorney fees, examination of abstract, and for commission upon the loan so procured; and that certain additional sums were paid to the said Stokburger upon each of the two extension agreements; which amounts when added to the rate of interest provided for in the note, slightly exceed an amount equal to 7% interest. The same claim was made



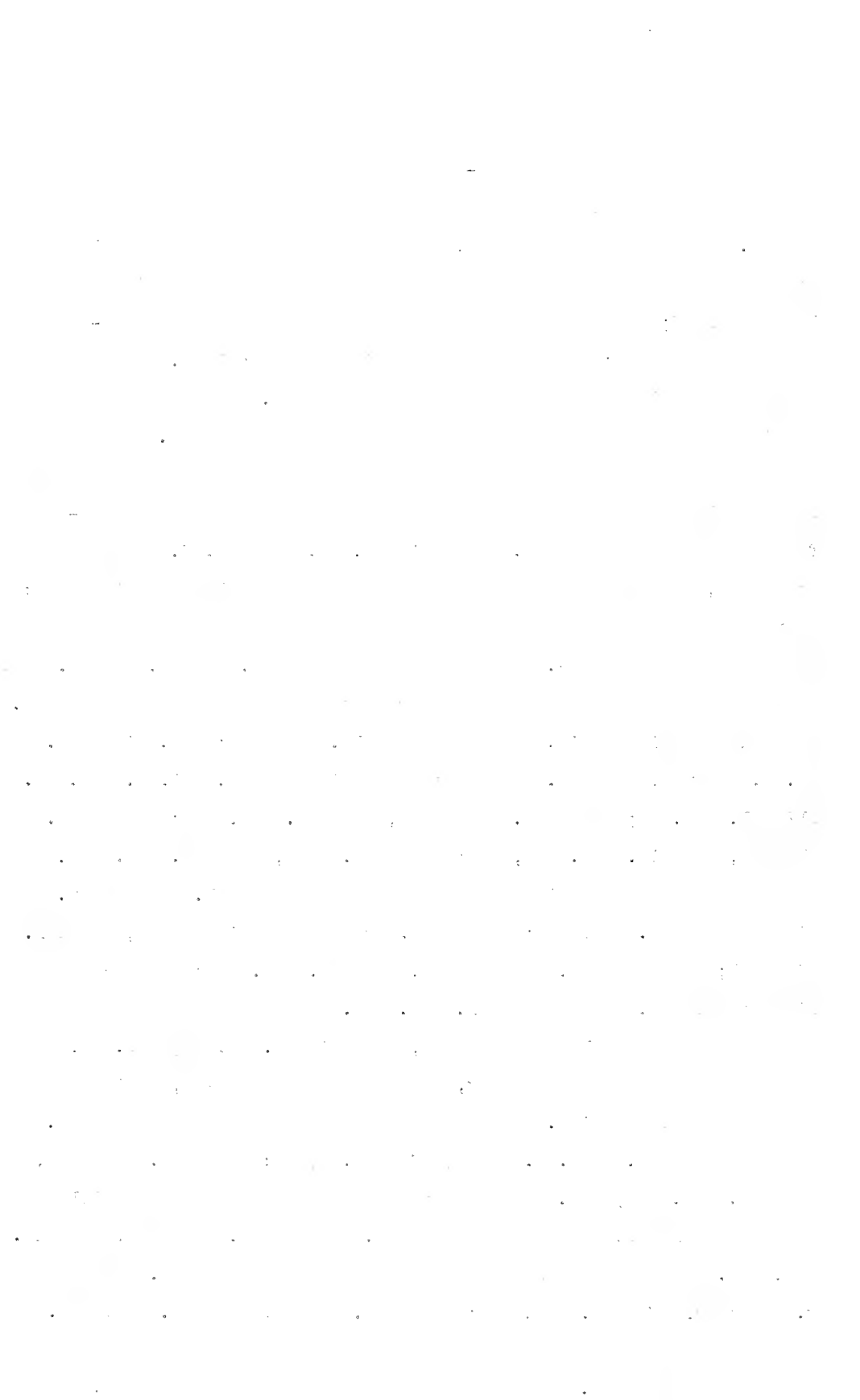


by the Whitmers against the second loan of \$1900 held by appellant herein. In the decree rendered, Rose Clay was penalized for all commissions paid Stokburger at the time of procuring the original loan of \$1500; all fees and commissions paid him for the two extension agreements; and all interest paid upon said loan. The same nature of penalty was enforced against appellant. Both of these parties objected to the penalty thus imposed against them.

The statutes of Illinois provide that the defense of usury shall not be allowed in any suit unless the person relying upon such defense shall plead the same. Cahill's St. ch. 74, Sec. 7. Jones on Mortgages, in dealing with this subject makes the following statement: "Usury must be specifically and particularly pleaded, or it will not be considered as a defense." Jones on Mortgages, Vol. 1, Sec. 643, p.1066. This rule has consistently been adhered to by the courts of this state. Hibernian Banking Ass'n. v. Davis, 295 Ill. 537, 545; Nat. Life Ins. Co. v. Donovan, 238 Ill. 283, 288; Hibernian Bank v. Chi. T. & T. Co. 217 Ill. App. 36; Harris v. Bernfield, 250 Ill. App. 446; Aldrich v. Aldrich, 260 Ill. App. 333, 354; Wilson v. Reid, 262 Ill. App. 230. And the facts constituting the usury must be set forth. Goodwin v. Bishop, 145 Ill. 421, 424; Stanley v. Trust and Savings Bank, 165 Ill. 295, 301; Van Cleave v. Fitzsimmons, 200 Ill. App. 609; Manufacturers Finance Trust v. Stone, 251 Ill. App. 414.

Section 30 of the Chancery Act, Cahill's St. Ch. 22, Sec. 30, provides that any defendant may, after filing his answer, exhibit and file his cross bill. This rule has been observed by our courts. Inter-State Bldg. Assn. v. Ayers, 177 Ill. 9, 22; Poyset v. Townsend, 166 Ill. App. 384, 387. Affirmative relief sought by a cross bill should be first suggested by the answer. Johnson v. McNellis, 228 Ill. 351, 355. A cross bill is a separate and distinctive suit. Ballance v. Underhill, 3 Scam. 453, 462; Thomas v. Thomas, 250 Ill. 354, 362.

No answer appears to have been filed by the Whitmers setting up the defense of usury. The abstract failing to show such answer, the



court in this instance made a careful search of the record, and found no answer appearing therein filed by the Whitmers. The praecipe for transcript provides under item (2), "All pleadings filed by the parties." The clerk's certificate is to the effect that the transcript contained in this record, "is a true, perfect and complete transcript of the record as ordered in the praecipe \* \* \* ." A cross bill was filed by the Whitmers, which in a general way asked for relief because of alleged usurious contracts. The contracts involved herein are legal upon their face. Usury is a defense not favored in equity. The burden of proof is cast upon the person setting up such defense, as he is seeking thereby to impeach his own obligation, formally entered into. Usury will never be imputed to the parties nor inferred when the opposite conclusion can be reasonably and fairly reached. Jones on Mortgages, Vol. 1, Sec. 643. There is no contention made that either Rose Clay or the appellant had any knowledge of the money usuriously taken by Stokburger.

We are not to be understood as holding that usury is not a legal defense, but before the law is invoked to punish and penalize the innocent, as in this case, the defense of usury should be specially pleaded as provided by statute, and clearly and definitely established. The decree herein as it stands under the state of the record, is erroneous in that it undertakes to grant relief under the usury statute, to the Whitmers upon a cross bill, when they were defendants in the original bill and no answer appears to have been filed by them setting up such defense.

The decree herein is reversed and remanded.

Reversed and Remanded.



STATE OF ILLINOIS,        }  
SECOND DISTRICT        }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court. at Ottawa, this\_\_\_\_\_day of \_\_\_\_\_in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT THE COURT OF THE DISTRICT OF THE STATE OF INDIANA,

Began and held at Ellettsville, on Tuesday, the second day of October,  
in the year of our Lord one thousand nine hundred and thirty-  
four, within and for the said District of the State of Indiana:

Present-- Hon. FRED A. WALKER, residing Justice.

Hon. HENRY WALKER, Justice.

Hon. JOHN H. WALKER, Justice.

MARTIN L. JOHNSON, Clerk.

H. J. WALKER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On October 2,  
1934, the modification of the opinion of the Court was filed in  
the Clerk's Office of said Court, in the words and figures follow-  
ing, to-wit:





Con. No. 5702

Estelle L. Line,

Appellant

Appeal from the Circuit

vs.

Court of Ingham County.

Charles L. Wither, et al.,

Defendants.

MUF--J.

After the foregoing opinion in this cause had been filed, appellees, Charles L. Wither and wife, filed their suggestions for diminution of record and motion for leave to file a copy of their answer in said cause, which motion was granted and copy of such answer supplied. To have examined said answer with respect to its allegations concerning the defense of usury, and find them to consist of approximately three lines, wherein it is charged that the notes secured by both trust deeds are usurious in that interest and commissions were paid in excess of seven per cent per annum. The answer does not state with whom the usurious contract was made; the amount agreed upon, taken, or reserved; or who received or contracted to receive any usury; or how, when or to whom such usury was paid.

It has repeatedly been held that a general charge of usury in an answer to a bill in chancery, will amount to nothing, unless the facts are alleged showing wherein the usury consists. *Waiser v. Norton*, 83 Ill. 512. The defense of usury is regarded as penal in its nature, and great strictness is required in the pleading thereof, and the usury must be proven as alleged. *Waiser v. Norton*, supra. It is not sufficient to plead in general terms that a transaction was usurious, but the facts relied upon as constituting usury must be set forth. *Goodwin v. Bishop*, 145 Ill. 421; *Stanley v. Trust and Savings Bank*, 165 Ill. 235; *VanCleave v. Fitzsimmons*,



200 Ill. App. 509; *McCormack v. McCormack*, 201 Ill. App. 414. We consider this rule to be supported by the greater weight of authority. See, e.g., *McCormack v. McCormack*, vol. 22, p.p. 431, 437. *McCormack v. McCormack*, vol. 3, para. 1236.

The answer failing to set out facts showing error, with that degree of certainty required by law, this court adheres to its former opinion whereby said cause was reversed and remanded.

Former opinion affirmed  
reversing and remanding  
said cause.



STATE OF ILLINOIS,        }  
                                      }ss.

SECOND DISTRICT

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and  
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby  
certify that the foregoing is a true copy of the **modification of the** opinion of the said Appellate Court in the above entitled cause.  
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said  
Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand nine  
hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



8558  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

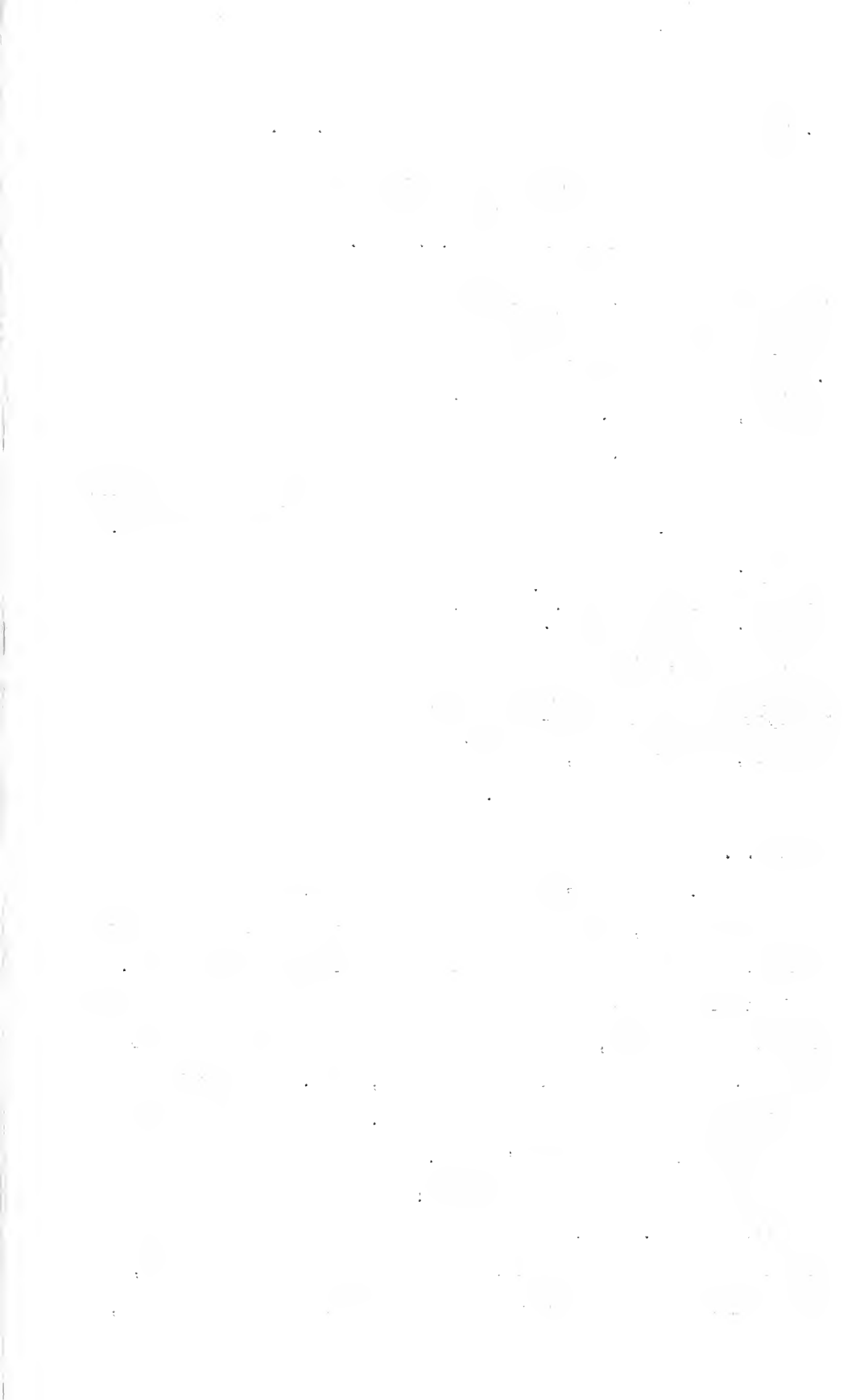
E. J. WELTER, Sheriff.

276 I.A. 608<sup>5</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

SEP 18 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





ordain, publish and declare this to be my last will and testament.

FIRST I order and direct that my executor hereinafter named, pay all my just debts and funeral expenses as soon after my death as convenient may be.

SECOND I give, devise and bequeath to my beloved wife, Ingabur Ness all of my personal property of every kind and character whatsoever that I may die seized of, including credits or money on hand or due to me, subject only to my just debts, funeral expenses and of probating this my last will and testament.

THIRD I give, devise, and bequeath to my said wife the full use controle and income from my farm of about one hundred and ten acres of land located in the town of Mission, and on which we now live, to have and to hold same during her natural life, said farm being however subject to a certain mortgage of \$2300.00, bearing date of March 6th, 1900, and payable to Andrew Jackson, the income or proceeds from said farm being subject to my just debts in case they are not all paid from the sale of personal property now on hand. (\*\*The real estate is here described.)

The provision made in sections two and three are to be taken by my wife, in lieu of her widow's award.

FOURTH Being in feeble health at the present time, should my death occur during the present year, then it is my desire and request that my wife and family, together with the advise of my Executor herein after named carry out my plans for farming this year, both as to the homestead and as to land that I have rented from Thomas Duffy in the town of Serena, and the Enoch Spalding farm in the town of Mission, all in LaSalle County, Illinois.

FIFTH: After the death of my said wife, I hereby give, devise and bequeath to my children herein after named, my above described homestead and any other property that may belong to my estate at that time, to be divided among them equally, share and share alike, after the just debts of my wife are paid. The names of my sons are



Fresenius Ness, Arthur Ness and Joseph Lyel Ness, and my daughters are Menelva Crensa Ness, Isabel Olive Ness, Ada Ness, Elma Odella Ness and Hannah Maria Ness, and to my step son Bartel B. Wagen who is the son of my said wife, I give him a share in this finale distribution of my estate equal to one-half of a share as given to my above children. And in the event that any of my said children should die before the death of my said wife, or before the distribution of my estate, and such child or children should leave living issue, then shall the share of such deceased child or children pass to their living child or children."

Then follows the appointment of the executor, the signing and the due execution of the will.

Ingeborg Ness, the widow of said Osman F. Ness, departed this life on the 4th day of January, 1929. Letters of administration were granted by the Probate Court of LaSalle County, Illinois, to August Marco on the 20th day of March, 1929. The said August Marco filed an inventory as such administrator, scheduling an interest in the real estate of Osman F. Ness, deceased, sufficient to pay the debts of said Ingeborg Ness and the costs and expenses of administration upon her estate. Claims were allowed against the estate of said Ingeborg Ness, deceased, as follows: Somonauk State Bank, allowed June 24, 1929, \$535.77; August Marco, allowed June 24, 1929, \$3,740.70; Serena State Bank, allowed June 24, 1929, \$541.47; and the Ottawa Banking and Trust Company, allowed July 2, 1929, \$2,481.00. Total claims allowed, \$7,298.94.

On the 10th day of April, 1930, said administrator filed his first account and report in the office of the Probate Clerk of LaSalle County, together with his proof of mailing notices of final settlement, at the May term, 1930, in said Probate Court. At the May term, 1930, of said court, said account and report was approved, and in the order approving the same, said Court found that claims had been allowed against the estate of Ingeborg Ness, deceased, as above set out, and further found that such claims,



together with the costs and expenses of administration upon the estate of said decedent, were the debts of said decedent.

On September, 1930, the complainants in this cause, being the claimants listed above, filed their bill of complaint in the Circuit Court of LaSalle County, Illinois, setting up the facts above stated and praying that the real estate owned in his life time by Osman F. Ness, deceased, be declared subject to the respective liens of the judgments obtained by said complainants in the course of the administration upon the said estate of Ingeborg Ness, deceased, and further praying that the residuary parties named in the Osman F. Ness will, or their successors in title, be directed to pay said judgments with lawful interest, together with the costs and expenses of administration upon the Ingeborg Ness estate, and that in default of payment, such real estate be ordered sold and the proceeds of such sale be used for such purpose.

After the overruling of a demurrer to said bill of complaint, the residuary parties answered said bill. They admitted the death of Osman F. Ness and administration upon his estate, all conveyances among the residuary parties excepting one, which they denied, the bankruptcy of Arthur Ness and the bankruptcy of Joseph Ness, but denied that the bankruptcies are material to this cause. They admit the death of Ingeborg Ness and the grant of letters "upon her supposed estate" and the filing of "an alleged inventory," but deny that Ingeborg Ness had any interest in the Osman F. Ness real estate other than a life estate.

The defendants further denied that they have any interest in the estate of Ingeborg Ness, or knowledge of the allowance of claims against her estate, except as shown by the bill of complaint. They denied that such allowance creates any lien against the Osman F. Ness real estate, either legal or equitable. They allege in their answer that the just debts referred to in the will of Osman F. Ness were debts "incurred for the necessary and



reasonable support of his wife," and that they have paid all such debts, and have filed no claims for the same because Ingeborg Ness left no estate. They further allege that such alleged claims allowed were for money obtained by other persons, to-wit: Arthur Ness and Joseph L. Ness, upon notes signed by Ingeborg Ness as surety, and that no part of such money was used for her welfare and support.

Said defendants further allege in their answer that Osman F. Ness intended that said Ingeborg Ness could charge his real estate only with debts for her personal support and comfort, and that she had no authority to subject his real estate to the payment of debts created by her as surety for others. Defendants deny knowledge of the proceedings for the final settlement of the estate of Ingeborg Ness as alleged in said bill, but admit the facts therein alleged relating thereto. They allege that the debts of Ingeborg Ness referred to were for notes upon which she was surety. They deny that the judgments obtained against the estate of Ingeborg Ness were within the contemplation of Osman F. Ness, and claim that any liability thereon against the said Ingeborg Ness was because of her signing as such surety.

The defendants further aver that Osman F. Ness was engaged in farming and that his personal estate was worth \$5000.00; that he employed a person with little experience to draw his will; that at the time of drawing his will said Osman F. Ness had enough personal estate to liquidate his debts; that Ingeborg Ness obtained ample support from her husband's personal property and her life estate in his real estate; that the debts described in said bill of complaint were created long after the death of Osman F. Ness.

After default of all defendants who had not answered, the cause was argued orally upon bill and answer. On April 13, 1932, said bill was dismissed for want of equity at complainants' costs, thereupon this appeal was prayed and perfected.





From the bill and answer, it will be observed that the question in issue, is the construction of that part of the will contained in the Fifth Clause concerning the disposition of the estate after the death of the testator's widow and all her just debts are paid. It is conceded that the wife of the testator, Osman P. Ness, died and her estate was administered in the Probate Court of LaSalle County; that the complainants in this bill filed claims against the estate of the widow, Ingeborg Ness, and that the same were duly allowed as claims against said estate. This was an adjudication by a court of record of the debts against the estate of Ingeborg Ness, and the defendants in this suit can not be heard to say that these claims are not the debts of Ingeborg Ness. - Sheahan vs. Madigan, 275 Ill., 372. The defendants do not seriously contend that the liability incurred by Ingeborg Ness because of her signing surety notes for her sons is a debt against her individual estate, but deny that under the will of Osman P. Ness such debts should be held to be a lien against the land owned by him in his lifetime. They contend that such debts should be limited to those that were necessarily incurred for the support and comfort of Ingeborg Ness during her lifetime.

In the case of Kratz vs. Kratz, 130 Ill. page 276, our Supreme Court had a similar question under consideration and on page 231 of the opinion say: "The construction here given to the second clause of the will as to both classes of property is fortified by the third clause, which directs that after the decease of the wife all the property, real and personal, etc.. which she may possess at the time of her death, 'be given, devised and bequeathed to my only child, William Kratz, absolutely, and on condition that all my wife's just debts and funeral expenses be paid by him.' The language here used, though somewhat in the nature of a request, is to be treated as a devise and bequest. Bergen V. Canill, 55 Ill. 160; McCartney v. Osburn, 113 id. 403. It is not stated here 'what may be left' or 'whatever shall remain' at the death of my wife, but 'what she



may possess." The property here in controversy being of a character not to be consumed in its use, under the law she would be held to possess all of it. Of course, by the express terms of this last clause William Kratz will only be entitled to the property at the death of his mother, subject to the payment of all her 'just debts and funeral expenses'; and if the wife contract 'just debts' for her support and maintenance, or other purposes, during her life, the defendant can only take the property upon the payment of such debts and her funeral expenses - and this we understand to be the holding and effect of the decree below. The decree of the Circuit Court will be affirmed."

In the case of Deaton vs. Dorsey, 75 Atlantic, page 239, a New Jersey case, the court was called upon to construe a will, the second clause, which is as follows: "I give devise and bequeath to Martha Morris, my beloved wife, during her natural life, all the income from my real estate and personal property after all the taxes and necessary repairs shall have been paid, and after her death then of my daughter Martha E. Morris is to become the owner of all that may be remaining of said real estate or personal property after my wife's funeral expenses and just debts are paid during her natural life then after her death the said property is to revert to my daughter nearest surviving heirs."

After the death of the widow and also after the death of the daughter a nurse, who had cared for the widow during her lifetime, brought suit against the executor of the estate of the original testator for the services that she had rendered to the widow. The court held in this case that the executor could not be compelled to pay the nurse for her services by a suit at law. In passing upon this question, the Court used this language: (Page 240-241 supra): "The direction in the will, to distribute the estate after payment of the wife's just debts, is in the nature of a legacy. It is not a contract made by the testator, nor does it furnish the foundation of an action at law to be enforced against the executor.



It may be that the claim is enforceable against the husband's estate by a suit in equity, requiring the payment of the just debts when ascertained, in which proceeding the persons entitled to the estate of the husband, whose shares therein would suffer diminution by the payment, should be made parties.

The conclusion is that a suit at law cannot be maintained against the executor of the deceased husband to enforce payment of the wife's just debts, by virtue of this provision of his will, but that the executors of the husband have the right to require the just debts to be first established by a suit against the wife's executor, for it is the wife's "just debts" eo nomine which alone can diminish the estates of the subsequent takers." These two cases are the only cases called to our attention that are similar to the one that we are to consider.

It is a rule of law that courts in interpreting a will, will try to arrive at the intent of the testator, when he made such will, but this intent can only be ascertained by the language used by the testator in the will. This rule applies with equal force whether the will has been drawn by a person who has special knowledge and experience in such matters, or has been drawn by a layman who does not have special skill and knowledge in the preparation of legal papers. It is our opinion that the language used by the testator, Osman F. Ness, in directing that, "after the just debts of my wife are paid" then his children should become the owners of his property, is broad enough to include the surety debts of the testator's widow, and the testator's real estate should be subjected to a lien to pay such debts.

The Court erred in dismissing the Complainant's bill, and the decree of the Circuit Court of LaSalle County is hereby reversed and the cause remanded to said court.

Reversed and remanded.

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STATE OF ILLINOIS,        }  
SECOND DISTRICT        } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the first day of May, in  
the year of our Lord one thousand nine hundred and thirty-four,  
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

276 I.A. 609'

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BE IT REMEMBERED, that afterwards, to-wit: On  
SEP 18 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

February Term, A.D. 1934.

N. E. Cederholmes,

Plaintiff in error

vs.

Error to the Circuit  
Court of Knox County.

Peoples Trust and Savings  
Bank, a Corporation,

Defendant in error.

DOVE-J.

This was an action in trover instituted by plaintiff in error against defendant in error for the conversion of certain bonds. A plea of the general issue was filed, upon which issue was joined, and a trial had, which resulted in a verdict of not guilty, upon which judgment was rendered and the record is brought to this court for review, a writ of error having been prosecuted by plaintiff below,

As the judgment must be reversed because of erroneous instructions, we will not review, at length, all the evidence. It appears, however, that in December, 1927, defendant in error, hereinafter referred to as the bank, was engaged in conducting a general banking business in Galesburg and A. M. Rose was Assistant Cashier thereof. That on December 20, 1927, plaintiff in error, who will be designated as plaintiff, brought various bonds of the par value of \$7,000.00 to Mr. Rose, and requested that some or all of them be sold and according to plaintiff's testimony, Mr. Rose told him he was selling American Bond and Mortgage Company bonds and that plaintiff should invest the proceeds of these bonds therein. Plaintiff thereupon inquired what the bank charged for taking care of them and collecting the interest, and Rose told him if he bought bonds which the bank was holding, there would be no charge. Thereupon all but two of the bonds of the plaintiff



were disposed of or exchanged for other bonds of equal par value, being \$5500.00, and the difference in accrued interest, premiums or discounts amounting to \$195.71 was credited to plaintiff's account in the savings department of the bank. These bonds of the par value of \$5500.00, together with a bond designated in the record as the "Elm Street Building bond" of the par value of \$500.00 and another bond designated in the record as the "Oakwyn Building bond" of the par value of \$1,000.00, were then placed by the bank in its safe keeping department and the bank issued to the plaintiff its receipt, which is as follows, viz:-

" PROPERTY DEPOSITED FOR SAFE KEEPING WITH  
PEOPLE'S TRUST AND SAVINGS BANK

Name--N.E. Cederholm No. \_\_\_\_\_  
Address--348 E. Ferris  
Not Negotiable Galesburg, Ill., Dec. 20, 1927  
Received from \_\_\_\_\_ of \_\_\_\_\_  
the following described property \_\_\_\_\_ for safe  
keeping only, and at his or her risk, and subject to  
the rules of this bank governing such deposits.

|                              | Bond No. | Amt. | Name | Date Released |
|------------------------------|----------|------|------|---------------|
| 18 Elm St. Bldg.             | 30       | 500  |      |               |
| Oakwyn Bldg.                 | 16       | 1000 |      |               |
| Alden Park Manor Ser Station | 78       | 500  |      |               |
| Alden Park Manor Ser Station | 79       | 500  |      |               |
| Alden Park Manor Ser Station | 81       | 500  |      |               |
| Alden Park Manor Ser Station | 82       | 500  |      |               |
| Miles Bldg.                  | 16       | 500  |      |               |
| Miles Bldg.                  | 18       | 500  |      |               |
| Lawrence Winthrop Bldg.      | 82       | 1000 |      |               |
| Lawrence Wintshrop Bldg.     | 71       | 500  |      |               |
| Diversey Apts.               | 26       | 500  |      |               |
| Diversey Apts.               | 25       | 500  |      |               |
| Accepted                     |          |      |      |               |

PEOPLES TRUST AND SAVINGS BANK agrees that without compensation said bank receives said securities or property only for the accommodation of said depositors and that said bank will give said securities or property the same ordinary care given other securities of this kind deposited with the bank, and in consideration of this gratuitous service it is mutually agreed that said bank is relieved of all responsibility for loss of said securities or property either of fire, burglary, theft, or other casualty of whatsoever kind and nature. Securities or property herein described will be returned only upon surrender of this receipt in person by owner herein named, or by his or her legal representative, upon executing the receipt below.

PEOPLES TRUST AND SAVINGS BANK, By A.M. Rose

Received the above described papers or articles in the same condition as they were when deposited.  
DATE \_\_\_\_\_



This receipt was offered in evidence by the plaintiff and is referred to in the instructions as "Plaintiff's Exhibit No. 1", and the bonds therein described are the bonds, for the recovery of the value of which, this suit was instituted.

According to the testimony of Mr. Rose, after he had procured these bonds of the par value of \$5500.00 and executed the safe keeping receipt describing them and the Elm Street and Oakwyn Building bonds of the aggregate par value of \$1500.00, plaintiff told him to take care of the bonds as though they were his own, as plaintiff considered the Cashier's judgment better than his, and requested him, Rose, to deposit the interest as collected, and any difference that there might be when exchanges were effected to plaintiff's credit in his savings account in the bank, and if in making exchanges any difference was due the bank, to withdraw the amount of the difference from that account representing the same by a debit slip. Several exchanges were subsequently made, always, so Mr. Rose testified, with the express approval of plaintiff, who stated that he left such matters entirely to the judgment of the cashier. Thereafter no bonds were bought or sold for cash except one, about which there is no dispute. When exchanges were effected, the small difference in accrued interest or premium was credited by the bank to plaintiff's savings account, except on one occasion when an exchange was effected and \$32.50 was charged against plaintiff's account. Interest on the various exchanged bonds was collected from time to time and also credited to plaintiff's savings account.

In July 1929 the First Galesburg National Bank and Trust Company succeeded to the business of the Peoples Trust and Savings Bank. The business transactions between plaintiff and these banks cover the period from December 20, 1927 to October 1932. The one bond that was sold was of the par value of \$500.00, and the proceeds credited to plaintiff's account. This was a Southern Utility bond, for which a





Lawrence-Winthrop bond had been exchanged. The evidence further discloses that various bonds aggregating in par value \$6500.00, none of which were the original bonds left by plaintiff with defendant for safe keeping in December 1927, and none of them described in the safe keeping receipt were tendered to the plaintiff before the suit was instituted, which was May 7, 1932, and also at the trial, but were not accepted by him.

Plaintiff, in his testimony, denied ever having the several conversations testified to by Mr. Rose, denied that he ever authorized Rose to sell or exchange his bonds described in the safe keeping receipt, insisted that he did not know that the bonds described in his receipt had ever been exchanged or sold, knew nothing about the purchase of other bonds, had never seen any of the other bonds tendered to him, but supposed the bonds described in his safe keeping receipt were in his safe keeping envelope at the bank.

One of the attorneys representing the plaintiff, Mr. Barash, testified in rebuttal that in May or June 1932 he had two conversations with Mr. Rose, and received from him a list of the bonds covered by plaintiff's safe keeping receipt and was informed by Rose of the various exchanges made; that Mr. Rose stated to him, in reply to a question as to why the exchanges were made, that the bank was exchanging its bonds and that he, Rose, thought it was for Mr. Cederholmes' interest to also exchange his bonds, but that Mr. Cederholmes did not know that these exchanges were being made. Mr. Rose did not deny this conversation as detailed by Mr. Barash, other than to say he thought Mr. Barash partially misunderstood him.

The bank admits the receipt of the bonds described in its safe keeping receipt, but denies that it ever converted to its own use any of the bonds of the plaintiff, but contends that in effecting the exchange of plaintiff's bonds and in all its dealings with and for the plaintiff, it acted under and pursuant to the directions of the plaintiff; that the plaintiff expressly authorized the exchange and by his course of conduct approved and ratified everything that the bank did.



It was the contention of plaintiff in the trial court and it is his contention in this court, that he had a bailment contract with the bank, having deposited with the bank certain bonds for safe keeping; that the receipt given him by the bank evidences this contract; that the bank, without his knowledge and consent, sold his bonds and sought to substitute other bonds in lieu thereof, and that he has never ratified or in any way approved the exchange of any of his bonds described in his safe keeping receipt, for any other bonds.

The issues presented by the pleadings and evidence in this case is whether the withdrawal of the bonds left by the plaintiff with the bank for safe keeping or the substitution of other bonds therefor was authorized by plaintiff or if unauthorized, whether he subsequently ratified the exchanges. Upon these issues the evidence is conflicting. The Assistant Cashier of the bank testified that he had that authority, plaintiff emphatically testified that he did not. The evidence disclosed that the interest derived from the substituted bonds was credited to plaintiff's account and he used it, but plaintiff's testimony is that he supposed it was the interest derived from his original bonds. In this state of the record, it was essential that the instructions be substantially accurate.

By the eleventh instruction given at the request of the bank, the jury was told that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. "If the plaintiff in this suit", continues the instruction, "has not so established his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases the jury should find the issues for the defendant." Instruction No. 17 told the jury "that the burden of proof in this case is on the plaintiff, and it is for him to prove his case by a preponderance of the evidence."

In the instant case the plaintiff established his case by proving the delivery of the bonds by him to the bank and its acceptance



of them for safe keeping, as evidenced by its safe keeping receipt, together with the further proof of the exchange of those bonds by the bank for others, and evidence tending to show the value of the original bonds at the time the exchanges were affected. As a defense, the bank introduced evidence tending to show that the plaintiff authorized the exchanges which the bank had made, and also offered evidence from which it contends plaintiff ratified the exchanges made by the bank. The real issues therefore were whether the exchanges were authorized in the first instance or if not, whether plaintiff had ratified the exchanges which the bank admittedly had made. These were affirmative defenses and the burden of establishing them rested upon the bank. *Richelieu Hotel Co. v. Military Encampment Co.*, 140 Ill. 248; *DeLand v. Dixon National Bank*, 111 Ill. 323; *Rich v. Naffziger*, 248 Ill. 455; *Stozky v. Robe*, 189 Ill. App. 540; *Cutler v. Pardridge*, 182 Ill. App. 350. The reason instructions 11 and 17 in the instant case were erroneous is because the jury might conclude therefrom that the plaintiff was bound to establish the negative of the affirmative defense interposed by the bank, before the plaintiff could recover. *Burns v. Landrum*, 238 Ill. App. 191; *United States Wringer Co. v. Cooney*, 214 Ill. 520; *Wright v. Sipple*, 179 Ill. App. 386.

Instruction No. 22 is as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff, N. E. Cederholmes, left with the Peoples Trust & Savings Bank, through its agent, Alden M. Rose, certain bonds for which Defendant gave to plaintiff its receipt, which has been admitted in evidence and marked 'Plaintiff's Exhibit 1,' and if you further believe from the evidence that the said bonds were exchanged by the said bank for other bonds, and if you further believe from the evidence that the interest, if any, received on the bonds which were secured in the exchange, if you so believe a ny interest was received, was credited to the account of N. E. Cederholmes by said bank with the knowledge and consent of said N. E. Cederholmes, and if you further believe from the evidence that said interest was accepted by said Cederholmes without any complaint having been made to the bank, and if you further believe from the evidence that the said Cederholmes never did make any protest to the bank as to the exchanging of the bonds for which defendant gave to plaintiff its receipt, which has been admitted in evidence and marked 'Plaintiff's Exhibit 1,' then the Court instructs you



that such action on the part of the plaintiff, N. E. Cederholmes, constituted a ratification of the acts of the bank in so exchanging such bonds and you should find the defendant not guilty."

By this instruction the jury were told that if the interest on the exchanged bonds was credited to the account of the plaintiff by the bank with the knowledge and consent of the plaintiff, and that said interest was accepted by the plaintiff without complaint and that the plaintiff never did make any protest as to exchanging the bonds, then such action constituted a ratification and the bank should be found not guilty. Nothing is said in this instruction about any knowledge on the part of the plaintiff of the exchange of securities. By this instruction the jury must have understood that if the plaintiff did have knowledge that the bank had credited his account with interest on bonds other than those named in his safe keeping receipt and that he acquiesced therein, that then his failure to protest that fact amounted to a ratification of everything the bank did in exchanging his bonds for other bonds. This is not the law. It would have been entirely proper, of course, for the jury to take the facts enumerated in the instruction into consideration in determining whether there was a ratification, but not that ratification necessarily followed as a matter of law. This instruction, in our opinion, should not have been given. DeLand v. Dixon National Bank, supra.

Instruction No. 19, given on behalf of the bank, is as follows, viz:

"The court instructs the jury that before plaintiff can recover in this case it is necessary for him to prove, among other things, by a preponderance of the evidence that the defendant wrongfully converted bonds for which the defendant gave to the plaintiff its receipt, which was admitted in evidence marked 'Plaintiff's Exhibit 1', and if you believe from the evidence that the defendant did not wrongfully dispose of said bonds, then you should find the defendant not guilty."

And the twenty-first instruction told the jury that if they believed from the evidence that the bank did not convert and dispose of the bonds described in the receipt, then they should find the defendant not guilty. Instruction twenty told the jury that if





they believed from the evidence that the bank did not convert and dispose of the bonds described in the safe keeping receipt but exchanged these bonds for others under the direction and authority of the plaintiff, then the jury should find the defendant not guilty. These instructions were all to the same effect, and all of them should not have been given as it is error to repeatedly instruct the jury on the same point and thus over-emphasize it and give it undue prominence. People v. Harrison, 261 Ill. 517. The word "wrongfully" as used in the nineteenth instruction was liable to mislead rather than enlighten the jury.

For the errors indicated, the judgment of the Circuit Court is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.



STATE OF ILLINOIS, }

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
OCTOBER TERM, A. D. 1964.

Term - O. 32

Page 10-15

MARGARET E. ILLIOTT,  
Appellee,

vs.

THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,  
Appellant.

APPELLATE COURT  
CIRCUIT COURT, F  
JANESVILLE, WISCONSIN,  
ILLINOIS

276 I.A. 609<sup>2</sup>

Murphy, J:

This cause was before this court at a former term and was reversed and remanded for the reasons stated in the opinion. Williams v. Prudential Ins. Co., 271 Ill. App. 502.

On the remandment of the cause the parties stipulated that appellee might withdraw the amount tendered into court by appellant without prejudicing to the right of either party as to the remaining claims appellee had under the policy.

On the re-trial the error giving cause for reversal in the former case was corrected and upon practically the same evidence as introduced in the former hearing the jury returned a verdict in favor of appellee and judgment was entered upon the verdict.

Appellant has perfected its appeal and its grounds for reversal urges the same points passed upon by this court in the former opinion. In the main, appellant's statement of the case in this record is verbatim the former statement and the authorities cited in its brief are the same except that two or three cases have been added. We have examined the additional cases cited by appellant and re-examined the other cases in the light of appellant's argument in this case. We adhere to our former opinion and it would not serve any useful purpose to restate our reasons for our former holding. The judgment of the lower court is affirmed.

Judgment affirmed.

*Not to be published in full*



STATE OF ILLINOIS,  
APPELLATE COURT,  
FOURTH DISTRICT.

October Term, 1934.

Agenda 19.

276 I.A. 609<sup>3</sup>

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Bettie Davis,  
Appellee,  
  
vs.  
  
East St. Louis & Suburban  
Railway Company,  
  
Appellant.  
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Appeal from Circuit Court of  
St. Clair County.

EDWARDS, P. J.

Appellee sued for and recovered a verdict and judgment against appellant, in the Circuit Court of St. Clair County, in the amount of \$2,500, from which the latter appeals. The action grows out of an alleged injury sustained by appellee while she was alighting from a street car of appellant, running between Belleville and East St. Louis.

Appellee testified that on February 12, 1931, she boarded the car at Belleville, to answer a want ad for housework. That when the car approached Seventy-third street, she rang the bell, signaling that she wished to alight. That the car passed the street, and she rang again, whereupon the car stopped. That the motorman and conductor were both standing in the front vestibule. That she started to alight, and while one foot was on the car step, the motorman suddenly started the car with a jerk, which threw her to the cement pavement, causing a femoral hernia and a dislocation of the coccyx. That she did not have such troubles prior to such occurrence, and that thereafter she suffered much pain, and was unable to do any heavy housework.





John Hall, a passenger on the car, was called as a witness by appellee, and gave testimony that he saw her get off the car; saw the car stop, the door open; saw appellee leave the car, which immediately started, but did not see any more, and did not know of any accident to her.

Both the motorman and conductor, who were standing in the front vestibule as she alighted, stated that no such accident occurred; that if it had, they would have turned in a report of it to the officers of the company. The claim agent of appellant stated that no report was made of any accident to appellee by the car in question.

Appellee was treated by three physicians. Dr. Stiehl was first called about the time of the claimed accident, and testified that she complained to him of pain in the back, but that he found no evidence of swelling, bruises or other injuries on her body.

Dr. Scruggs examined her shortly after February 12, 1931, and found that she was suffering from chronic colitis, but that he made no special examination for hernia. However, that he examined the outside of her abdomen and groins and saw no swelling at the region where a femoral hernia is likely to exist, and that he found no external injuries on her limbs or body.

On March 13, 1931, she consulted Dr. Reuss, who thereafter treated her. He testified that she was suffering from a femoral hernia, and that the coccyx was pushed in, and that an operation would be necessary to cure such ills. On cross examination he stated that he could not tell whether this was an old hernia, or one of recent origin, but that it might have existed many years before.

Appellee's husband gave testimony that prior to February 12, 1931, his wife was not troubled with hernia; and Caroline Nesbit, a practical nurse, testified to treating appellee for about two months after such time, and that she noticed the swelling, but did not know that it was a hernia.

To reverse the judgment, appellant contends that the alleged



accident did not happen; that the trial court, over objection of appellant, admitted improper and prejudicial testimony; that the verdict is contrary to the clear preponderance of the evidence, and that the court erred in overruling its motion for a new trial.

From the resume of the material evidence, as before stated, it appears that the case, both on the question of liability, and damages, was close on the facts. Here this is true, it is essential that no prejudicial error of law intervene which might reasonably affect the jury's finding, and in such case the rulings of the trial court upon questions of the admissibility of evidence, will be strictly scrutinized by a reviewing court, and the judgment reversed if any error has occurred in such rulings which might have worked to the prejudice of the defeated party. *O. & N. W. Ry. Co. v. Donworth*, 203 Ill., 198.

It is insisted that certain testimony of Dr. Reuss was incompetent and prejudicial, in that he was permitted to testify that the injury which plaintiff claims she sustained, was produced by a fall from the car of appellant. The testimony is as follows:

"Q. - If a woman, now 46 years old, 43 years old in 1931, had fallen from a street car onto a pavement, and if that woman had been healthy before that time and done heavy housework and was injured in the fall from the street car, and afterwards had pain in the region where you described this illness, and had a condition of hernia, would you have a judgment as to whether that fall had any effect producing that illness?"

"A. - I would."

"Q. - What would that be?"

"A. - I would think so."

"Q. - You think that fall caused that hernia?"

"A. - I would say it would be possible that is what caused it."

Proper objections were made by appellant, and overruled by the Court.



The true rule as to such testimony is stated in *Kimbrough v. Chicago City Ry. Co.*, 272 Ill., at page 77, as follows: "Where there is a conflict in the evidence, as in this case, as to whether or not the party suing was injured in the manner charged, it is not competent for witnesses, even though testifying as experts, to give their opinions on the very fact the jury is to determine. \*\*\* A physician may be asked whether the facts stated in a hypothetical question are sufficient, from a medical or surgical point of view, to cause and bring about a certain condition or malady, or he may be asked whether or not a given condition or malady of a person may or could result from and be caused by the facts stated in the hypothetical question, but he should not be asked whether or not such facts did cause and bring about such condition or malady." *The People v. Schultz*, 260 Ill., 35. *Keefe v. Armour & Co.*, 258 Ill., 28.

The first question asked the witness was whether he had a judgment as to whether the fall referred to in the hypothetical question had any effect as to producing the illness referred to in the question, and after stating that he had such judgment or opinion, he was permitted to state, after being asked what the opinion was: "I would think so." Here he was expressing his opinion that the injury was caused by the fall in question; not that it might or could be, but that it was, and the determination of which was the function of the jury, and not of the witness.

He was further asked: "You think that fall caused that hernia?" To which he replied: "I would say it would be possible that is what caused it." Again he was passing judgment upon one of the ultimate facts as to whether the hernia was caused by the fall, if in fact there was a fall.

Appellee argues in regard to the first, or hypothetical, question, that "it was not whether the fall did cause the condition in the physician's opinion, but was whether in his judgment the fall had any effect



toward producing the condition." In our opinion it is the same thing, whether it alone caused the condition, or whether it had any effect in producing it. In either event, the witness is deciding the ultimate fact of whether the fall caused the condition, or contributed to produce the condition. It did not, within the rule of the Kimbrough case, supra, (cited by appellee) call for the opinion whether the facts hypothetically stated, could or might cause, or contribute to cause, the condition, and then leaving it to the jury to decide if in fact it did so. The witness was asked to determine whether the facts, so stated, "had any effect in producing that illness." This was trenching upon the province of the jury, and was improper.

Further argument is made that even though the first question and answer were violative of the rules of evidence, it was cured by the second question and answer: "You think that fall caused that hernia? A.- I would say it would be possible that is what caused it."

This is even a greater infringement upon the rule than the former. It will be noticed that the second question called upon the witness to state directly whether in his opinion the fall caused the hernia; not whether it could or might, but whether it in truth did; and to this interrogatory the witness stated that he would say it would be possible that is what caused it; not that it might have caused it, or could have caused it, but that it would be possible that is what caused it. In other words, giving it as his opinion that it (the fall) was the cause of the hernia; an essential element of the case, which was in dispute.

In our opinion this evidence was erroneously admitted; and that its effect upon the jury was bound to be injurious, cannot be doubted. In the state of the record, with the proof close upon the questions as to whether there was a fall from the car, and if so, what its effect was on appellee's physical condition, it might well be the factor which





determined the verdict of the jury.

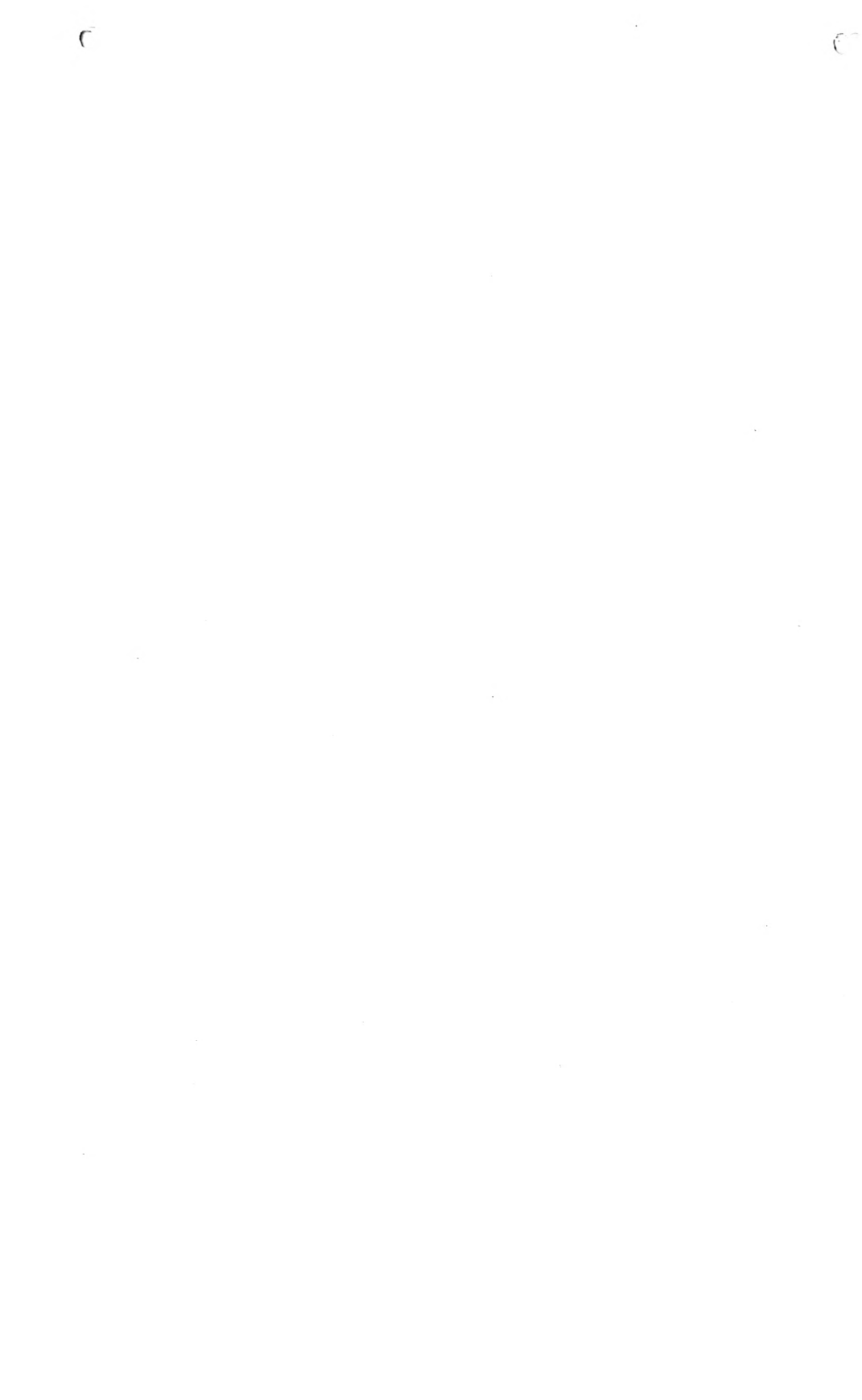
It further appears that Mrs. Caroline Nesbit, the practical nurse, was permitted to testify, over objection, as to the effect of the claimed injuries upon appellee when she walked. She was asked: "How was it with Mrs. Davis about getting up and walking during that time?" To which she answered: "Then she got up, she walked a little, a few steps, and then got pain in the spinal part, the back." At this juncture objection was made and overruled, and the witness continued her answer: "And she would have to keep standing, and her leg was about that high off the floor and just deadened like that. The nerves, I guess." Appellant moved to exclude the answer; however, the court denied the motion.

We think this was error. The witness stated that appellee, after walking a few steps, had pain in the spinal part. She did not testify to any words of appellee, nor exclamations, indicating that she had been seized by pain; hence it was but the conclusion of the witness, as to the presence of pain, and also as to the portion of the body where it existed. She further stated that the leg was deadened, caused, as she guessed, by the nerves. No facts were recited upon which to base such an opinion; therefore it was incompetent, and should have been stricken upon appellant's motion. As before stated, the refusal to strike was error.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

*not to be published in full.*



STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A. D. 1934

TERM NO. 8

AGENDA 20

ELIZABETH BROWN, administratrix  
of the estate of SYLVESTER  
BROWN, deceased,  
Plaintiff (Appellee),

vs.

H. A. GRABBE, Doing Business Under  
the Name of H. A. GRABBE CONSTRUCTION  
COMPANY,  
Defendant (Appellant).

276 I.A. 609<sup>4</sup>

Appeal from the  
City Court of  
Alton, Madison  
County,  
Illinois.

STONE, J:

This is an appeal from the City Court of Alton, Illinois,  
wherein Appellee recovered judgment against Appellant in the sum  
of \$498 on an account. Many errors of the trial court are assigned  
to which Appellee makes no reply.

Appellee having failed to file a brief in compliance with  
the rules of this court and it appearing from the record before  
us that the court erroneously entered the judgment appealed from,  
the judgment is reversed.

JUDGMENT REVERSED

Not to be published in full



#5

STATE OF ILLINOIS,  
APPELLATE COURT,  
FOURTH DISTRICT.

May Term, 1934.

Agenda 7.

276 I.A. 609

William B. McIlwain,

Appellee,

vs.

Otto Kloth, Violet Kloth, Louis

Kloth, John D. McFadden and

John Pracyk,

Appellants.

Appeal from Circuit Court of  
Randolph County.

EDWARDS, P. J.

Appellee filed his bill of complaint in the Circuit Court of Randolph County, to foreclose two constructive mortgages upon lands in said county.

The bill avers that on February 28, 1921, appellants Otto Kloth and Louis Kloth executed to appellee their promissory note for \$6,000, due in 5 years, to secure which they deeded to appellee, in fee simple, 160 acres of land in Randolph County. That the deed was agreed and intended to be a mortgage to secure the \$6,000 note. That on June 1, 1925, said grantors orally surrendered to appellee their title and right in 80 acres of such, and in consideration thereof were to be credited with a payment on said note of \$2,750. That on August 21, 1930, appellee and said appellants mutually agreed that the balance due on the \$6,000 note was \$4,495; that appellee should surrender the said note to the makers and



release said Louis Kloth from all liability thereon; that Louis Kloth should surrender all of his interest in such premises; that said sum of \$4,495 was the difference then due between the \$6,000 note and the interest thereon, and the credit of \$2,750; and that Otto Kloth and Violet Kloth, his wife, should execute a note for \$4,495, to order of appellee, due in five years.

That to secure the last mentioned note, it was agreed that Otto Kloth, and Violet Kloth his wife, should give appellee a deed to another 40 acres of land, which he was to hold with the 80 acres, not previously surrendered, as security for the note of \$4,495. Appellee, at the same time, to execute and deliver to said Otto Kloth and Violet Kloth a bond for deed, agreeing to re-convey to them said premises, if they paid said note and kept up interest payments thereon, and also paid the taxes on the lands. All of which acts, agreed to be done, were alleged to have been performed.

That on December 21, 1932, said Louis Kloth and Lulu Kloth, his wife, executed and delivered to appellee a quit claim deed of the 80 acres which had previously been surrendered to the latter.

It is further alleged that no part of the \$4,495 note was paid to appellee; that certain interest was due and unpaid thereon, together with taxes on the land; whereby the premises had become forfeited, subject to right of redemption by Otto Kloth and Louis Kloth.

That on September 9, 1932, appellee did cause judgment to be confessed on said \$4,495 note, in the sum of \$5,249.70; that interest was then due thereon in the sum of \$279.70; that no part thereof has been paid; that said note became merged in the judgment, and that the mortgages stood as security therefor. The bill prayed for an accounting and a finding as to who was liable thereon, with an order to such persons to pay the same, or, in default thereof, that the premises be sold to satisfy the amount due.

Appellants demurred to the bill. The court overruled the demur-





rer, which appellant elected to stand by. The case was referred to a Special Master in Chancery to take and report the proofs and findings, and upon the coming in and confirmation of his report, the court rendered its decree.

The decree found, among other things, that judgment was confessed upon the \$4,495 note; that the total amount of interest due on said note, at the time judgment was so confessed, amounted to \$614.88; that Otto Kloth and Violet Kloth were given credit on said note in the sum of \$98.21, leaving a total amount of annual interest due and unpaid from Otto Kloth and Louis Kloth, to appellee, \$516.67, or a total of \$629.23 for interest and taxes. It also found that the \$6,000 note was credited with a payment of \$2,750; that Louis Kloth and Otto Kloth orally relinquished all title to 80 acres of the land conveyed to secure said note; that appellee went into and has since remained in possession, and that said defendants (referring to Louis Kloth and Otto Kloth), owed appellee the sum of \$2,750; that appellee holds said lands as security, and that the defendants Otto Kloth and Louis Kloth have an equity of redemption therein.

It then orders and decrees that Otto Kloth and Louis Kloth pay said sum of \$2,750 to appellee within 15 days, or, in default, that the said premises, in which appellants orally relinquished their interest, be sold to satisfy said amount of \$2,750 and costs. Also, that Louis Kloth, Otto Kloth and Violet Kloth pay to appellee, within 15 days, said sum of \$629.23, so due for interest and taxes, and in default of such payment, that the lands so conveyed by Otto Kloth and Violet Kloth, to secure payment of the \$4,495, be sold to satisfy same and costs.

Appellants have perfected this appeal, and urge three assignments of error: 1st, the court erred in overruling their demurrer; 2nd,



the court erred in finding a balance due on the first mortgage, contrary to the allegations of the bill of complaint; 3rd, that it was error to decree a foreclosure of the delinquent interest on the note which had merged in the judgment.

Three grounds were set up in the special demurrer; one of which was that the bill is multifarious.

The bill, while rather inaptly drawn and somewhat difficult to understand, we think, when considered in its entirety, sets forth grounds which are not distinct or disconnected, but arise out of the same series of transactions from one course of dealing, and all tended to one result. In which event, under the authority of *Miller v. Hale*, 308 Ill., as stated on page 279, it is not subject to the objection of multifariousness.

A further ground of demurrer was that the bill, upon its face, showed that the note upon which the foreclosure was based, had been merged in a judgment. If such be true, then under the rule as declared in *Jocelyn v. White*, 201 Ill., p. 16, the ground was well assigned. We think, however, that a fair construction of the bill is that the foreclosure is grounded upon the judgment, and not upon the note on which it was predicated.

Another ground of demurrer was assigned, but inasmuch as appellants have not argued same, it will be regarded as waived. *Melton v. Rittenhouse*, 111 Ill. App., 30. *Pearce et al. v. Miller*, 201 Ill., 188.

In our opinion the Chancellor did not err in overruling the demurrer.

The second assignment of error is that the court erred in finding a balance due on the first mortgage, contrary to the allegations of the bill.

As previously observed, the bill alleged that on August 21, 1930,



appellee and Otto Kloth and Louis Kloth mutually agreed that \$2,750 should be credited on the \$6,000 note, in consideration of an oral surrender, by appellants to appellee, of their interest in 80 acres of the mortgaged lands; that the balance remaining was \$4,495; that appellee should take therefor a new note from Otto Kloth and Violet Kloth, they to execute to him a deed for another 40 acres of land, which, together with the remaining 80 acres, originally conveyed, should be his security for the new note; that the \$6,000 note should be surrendered, and Louis Kloth released from all liability on the latter note. All of which was alleged to have been done, and which constituted a settlement and satisfaction of the \$6,000 note, by which the obligation was discharged and another substituted in its stead, and which relinquished all rights under the mortgage given to secure the \$6,000 note. The settled rule of law is that the debt is the principal thing, and when it is paid, the mortgage, which is but an incident, or accessory to it, is extinguished. *Ventres et al. v. Cobb et al.*, 105 Ill., p. 41. *Redmond et al. v. Packenham et al.*, 66 Ill., 434. 41 Corpus Juris, 785, Sec. 886.

The bill alleging that the first mortgage being satisfied by the payment of the debt, as represented by the note which it was given to secure, the court was without power to decree anything due thereunder; it being the established rule that the decree can award no relief unless based upon a sufficient allegation of the bill. *Hawley et al. v. Hawley*, 187 Ill., 351. *Parker et al. v. Shannon*, 114 Ill., 192.

Here the bill, by its terms, set forth facts which showed that the first mortgage was satisfied; yet the decree proceeded to find \$2,750 due thereunder, and ordered appellants Otto Kloth and Louis Kloth to pay same. Not only was there no allegation in the bill upon which to base such finding, but it was contrary to its averments, and wholly unwarranted. Moreover, Louis Kloth was, according to the charge of the bill, completely



released by appellee from any liability under the debt secured by the first mortgage, and absolved from any obligation to pay it; and the direction of the court that he do so, was inconsistent with the allegations of the bill, and erroneous.

Another assignment of error was made, but appellants have not argued same; hence it will be regarded as waived. *Melton v. Rittenhouse and Pearce et al. v. Miller, supra.*

For the errors indicated, the decree is reversed, and the cause is remanded.

Reversed and remanded.

*not to be published in full*





STATE OF ILLINOIS,  
APPELLATE COURT  
FOURTH DISTRICT.  
MAY TERM, A.D.1934.

Term No.7

Agenda No 9.

D. .Bates, Superintendant of Banking  
of the State of Iowa, Receiver of the  
First Iowa State Trust and Savings  
Bank of Burlington, Iowa,  
Plaintiff and Appellant.

vs

Board of Education of Frankfort  
Community Consolidated School District  
No. 68, County of Franklin et al.  
Defendants and Appellees

276 I.A. 610<sup>1</sup>

Murphy J.

Plaintiff and appellant, Superintendant of Banking  
of the State of Iowa, Receiver of the First Iowa State Trust  
and Savings Bank of Burlington, Iowa instituted an action  
in assumpsit in the circuit court of Franklin County against  
the Board of Education of Frankfort Community Consolidated  
School District No.68 and Frankfort Community Consolidated  
District No. 68 and five common school districts numbered  
71.72.74.81 and 82 respectively of Franklin County, to re-  
cover upon a certain school order which was issued by the  
consolidated district August 16, 1922.

The consolidated district filed a general and special  
demurrer to the second, third and fourth amended counts and  
the common school districts filed a joint and several general  
and special demurrer to the same counts. Both demurrers were  
sustained and appellant electing to stand on said counts a  
judgment that he take nothing by his writ was entered and  
this appeal followed.

By the second amended count it is alleged that on  
August 16, 1922 said consolidated district was indebted to the  
Metropolitan Supply Co. for tables, chairs, blackboards and other  
merchandise which indebtedness was evidenced by four school  
orders before then issued by the consolidated district and  
that for the purpose of paying the outstanding orders the  
consolidated district issued this order payable to the Met-  
ropolitan Supply Co for \$2310.



It is further averred that after the issuance of the order and pursuant to certain proceedings five separate territories were detached from the consolidated district and organized into five common school districts, defendants herein, and that such newly created districts are now operating as school districts; that after detaching said districts no action was taken by the school trustees towards causing an appraisal and division to be made of the property owned by the consolidated district and that none of said property was divided between the newly created districts; that the County Superintendent of Schools of Franklin County had not subsequent to the detachment proceedings ordered the consolidated district to pay its outstanding obligations and to divide its property and that said order had not been paid by any of the defendants.

The third amended count is in substance the same as the second, except that it is alleged that said order was at the time of the creation of the new districts a legal outstanding obligation of the consolidated district with sufficient levies made to pay it. The fourth is the same as the second except that it is alleged that the common school districts are defacto districts and that the consolidated district had never been discontinued or dissolved but is in existence with two of the original seven district yet remaining.

The detachment of the five territories from the consolidated district and the organization of the five new common school districts out of such territory would not in itself make the new districts liable for the outstanding debts of the consolidated district. *School Directors v Miller* 49 Ill. 494.

After the detachment proceedings it was the duty of the school trustees to proceed under sections 64 and 65 of the General School Act and cause the property of the consolidated district to be appraised and apportioned, *Ketcham v Board of Education* 324 Ill. 314, and until this was done and some of the property of the consolidated district received by the new districts there could not be any liability



resting upon the new districts to pay the debts of the consolidated district. School Directors v Miller supra; Rogers v People 68 Ill. 154; Moll v School Directors 23 Ill. App.508.

There is an allegation in each count that no appraisal or apportionment of the property was made and since none of the counts alleged facts of an express or implied promise on the part of the new districts to pay the order the court did not err in sustaining the demurrer of all of the common school districts to each of the amended counts.

Appellant sues as the assignee of the Metropolitan Supply Co. The only contract of transfer of the order from the Supply Co. to appellant is that of a blank indorsement upon the back of the order. Such indorsement was sufficient to vest title in the appellant. Newell v School Directors 68 Ill.514. The order was in the form prescribed by Section 124 of the General School Act and was drawn in compliance therewith. It was not a negotiable instrument, Newell v School Directors supra; Morrison v Austin State Bank 213 Ill.472, and to entitle appellant as assignee to maintain this suit in his own name it was incumbent upon him to so shape his pleadings as to bring himself within the requirements of Section 18 Chapt.110 Cahills Statutes 1931,1907 Practise Act.

One of the provisions of said section 18 is that the assignee shall by his pleading on oath allege that he is the actual bona fide owner thereof and set forth how and when he acquired title. The allegation is "That afterwards on, to wit, the 16th day of August A.D.1922 the First Iowa State Trust and Savings Bank acquired title <sup>to</sup> said order No.69 issued by said Board of Education of Frankfort Community Consolidated School District No. 68, having acquired title to said school order No 69 by assignment of the same by the Metropolitan Supply Company for a valuable consideration, and the plaintiff is the actual bona fide owner of said order by said assignment".

In Allis-Chalmers Manf.Co.v Chicago 297 Ill.444,450 the court said, "A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of



that to be furnished in full.

Judgment affirmed.

court of Franklin County is affirmed.

For the reasons assigned the judgment of the circuit

case makes it unnecessary to consider them.

appellees have urged other reasons but the view we take of the

To sustain the judgment of the circuit court the

change how he acquired title. *Blanke v Hammel* 250 Ill. App. 251.

actual bona fide owner" a sufficient averment of facts to

had title "for a valuable consideration" and that he was the

of the pleader that plaintiff "acquired title" and that he

*Bank v Old H.M.T. Co.* 250 Ill. App. 442, nor were the conclusions

the statute as to when he acquired title, *Hedison & Keadle State*

quired title, the appellant did not meet the requirements of

ation "That afterwards on to wit August 16, 1922 plaintiff ac-

The order was dated August 16, 1922 and by the alleg-

To the same effect *Gallagher v Schmidt* 318 Ill. 40.

*Ottawa* 240 Ill. 259; *Prouty v City of Chicago*, 250 Ill. 222.

cover does not state a cause of action. *Walters v City of*

without whose existence the plaintiff is not entitled to re-

he acquired title. A declaration which fails to allege a fact

actual ownership thereof by him and setting forth how and when

section 18, showing the assignment of the chose in action, the

the plaintiff unless it contains the allegations required by





STATE OF ILLINOIS,  
APPELLANT COURT  
FOURTH DISTRICT.  
MAY TERM, 1934.

Term No. 14.

Agenda No. 3.

Violet Ann Lewis, Administratrix :  
of the Estate of Benjamin F. Lewis, :  
Deceased. :

Appellee. :

Appeal from the  
Circuit Court of  
Madison County.

vs

Illinois Terminal Company, a  
Corporation. :

Appellant. :

276 I.A. 610<sup>2</sup>

Murphy J.

This suit was instituted in the circuit court of Madison County by Violet Ann Lewis, Administratrix of the Estate, of Benjamin F. Lewis deceased hereinafter referred to as appellee, against the Illinois Traction Co. hereinafter referred to as appellant, to recover damages for the death of appellee's intestate, which death was the result of injuries sustained when the truck driven by deceased collided with appellant's interurban electric car at the intersection of appellant's track and Schwarz Street in the City of Edwardsville.

The declaration upon which the case was tried consisted of four counts. The first charged general negligence in the management and operation of the electric car, the second that the car was driven at a speed greater than was reasonable and proper having regard to the traffic and use of the way, the third that it was driven at a speed greater than was reasonable and proper and so to endanger the life, limb and property of persons and the fourth that no bell or whistle was sounded contrary to the statute. All counts alleged due care on the part of the deceased. Defendant filed a general issue plea and upon trial the jury found the issues for appellee and assessed her damages at \$1300. Motion for new trial was overruled and judgment entered on the verdict.

On this appeal appellant seeks reversal of that



Judgment and urges among other grounds that appellee did not prove that deceased was in the exercise of due care and caution for his own safety.

Schwarz street extends east and west and the electric railroad runs in a general northerly and southerly direction, intersecting the street at approximately a right angle. The land west of the right-of-way and south of Schwarz street was low, swampy and used principally as a dump ground. The traveled portion of Schwarz street was lower than the surface of the road-bed. At a point 6 feet west of the west end of the ties under the rails the street was eight tenths of a foot lower than the railroad rails, at 21 feet, three and a half feet lower, at 29 feet, six and a half feet, at 96 feet, ten and one half feet and from the last point west for a distance of two hundred feet from the ties the street was practically level.

In Schwarz street and on the south side of the traveled part of it there was a sign board, owned by a private party and erected with the consent of the city officials. This board was 12 feet high 25 feet long supported on three posts with three brace posts and extended parallel with Schwarz street. The distance from the railroad track to the east end of the sign board was variously estimated from 12 to thirty feet but the overwhelming weight of the evidence fixes it at twenty to thirty feet.

The railroad ran in a straight line south of the crossing for a distance of 760 feet. At a point about 450 feet south of the crossing the railroad crossed a small ravine on a trestle which was 100 feet long and 15 to 20 feet above the lowest ground.

This accident occurred about 2 P.M. July 12, 1931. The car was approaching the crossing from the south and deceased driving a small truck was coming from the west.

Dewey Lewis, brother of deceased, the only eye witness who testified for the appellee, says that the deceased was driving the truck and he was riding beside him, that they started from their mother home about three blocks



distant from the crossing, that they entered Schwarz Street two block west and drove toward the crossing at about 15 miles per hour, when about 175 feet west of the crossing they slowed down and deceased looked both ways, that he did the same thing but didn't see anything, that when about thirty feet from the crossing deceased stopped the truck from one to two minutes and looked both ways. itness says he listened and looked to the north and did not see anything and looked to the south and could not see anything on account of the shrubbery, bushes and bill board, that the bill board was on their right, that their was bushes "all around there" between the bill board and the track, that the deceased started the truck up the grade running it in low gear at seven or eight miles per hour, that they did not stop any more before the collision, that the car was 10 or 12 feet away when he first saw it and that deceased then turned the truck to the north to avoid the collision but that it was too late and that the car struck the truck on the right front.

Both parties concede that the bill board did obstruct the view south from Schwarz Street, to any one standing or riding opposite it. The evidence is conflicting as to the height and density of the brush, weeds and undergrowth south of the street and west of the bill board but from the bill board east to the tracks, a distance of 20 to 30 feet, the testimony of the witnesses corroborated by the photographic exhibits, taken within two hours after the accident, show that for this space there was no obstruction to the view looking south along the railroad tracks for a distance of five or six hundred feet, except as to such as would be furnished by a couple of telephone poles and a small bush or elm standing on the low ground some distance from the railroad track.

There is a conflict in the evidence as to the speed of appellant's car and as to whether the whistle blew before reaching the crossing. All of appellant's witnesses, who testified on the subject said that the whistle was blown while appellees witnesses testified that they did not hear



a bell or whistle. Some of the witnesses testifying for appellant who were two or three blocks from the crossing at the time of the accident, testified that they heard the car as it crossed the trestle south of the crossing.

When the deceased drove the truck from behind the bill board, which the testimony shows is 20 to 30 feet west of the tracks, he could have looked in the direction from which the car was approaching for at least 700 feet and going up the grade on to the crossing at a speed of seven or eight miles per hour he could have easily stopped the truck before reaching the track and avoided the collision. The evidence that the deceased stopped the truck near the bill board and at a place where he should have known his view would be obstructed by the board cannot be given weight in determining whether he exercised due care for the law does not tolerate the absurdity of allowing a person to testify that he looked at a point where he knew his vision would be obstructed.

In *Greenwald v B. & O. R.R.Co.* 332 Ill.627, the court said, "The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence."

Since this case was submitted on oral argument the Supreme Court has filed an opinion in the case of *Provenzano v I.C.R.R.Co* 357 Ill.192 the facts of which are similar to the facts of this case. The plaintiff in the *Provenzano* case was driving a truck up a grade toward the railroad crossing, that when he was 40 to 50 feet from the crossing he stopped and looked that he then proceeded





in low speed and then changed to second speed and looked again when he was about 20 or 25 feet from the crossing and saw nothing; that he did not look again until the train was upon him. It also appeared that from the point where he last looked the view was unobstructed for 900 to a 1000 feet. The court reversed a judgment for the plaintiff and in the opinion said 'Plaintiff's own evidence not only fails to establish due care on his part, but it affirmatively shows him to have been guilty of contributory negligence.'

We find that appellee has not proven that deceased was in the exercise of due care and caution for his own safety and that the court erred in not directing a verdict for appellant.

Other errors are assigned but the view we take on this matter makes it unnecessary for us to consider the other points.

For the reasons assigned the judgment is reversed, with a finding of fact that deceased was not at and before the time of the accident in question in the exercise of due care and caution for his own safety.

Judgment reversed.

*Not to be published in full.*













